TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 234

THE WESTERN & ATLANTIC RAILROAD, PETITIONER,

vs.

MRS. NORA E. HUGHES, AS ADMINISTRATRIX OF THE ESTATE OF IRA L. HUGHES, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED JUNE 30, 1939

CERTIORARI GRANTED OCTOBER 16, 1939

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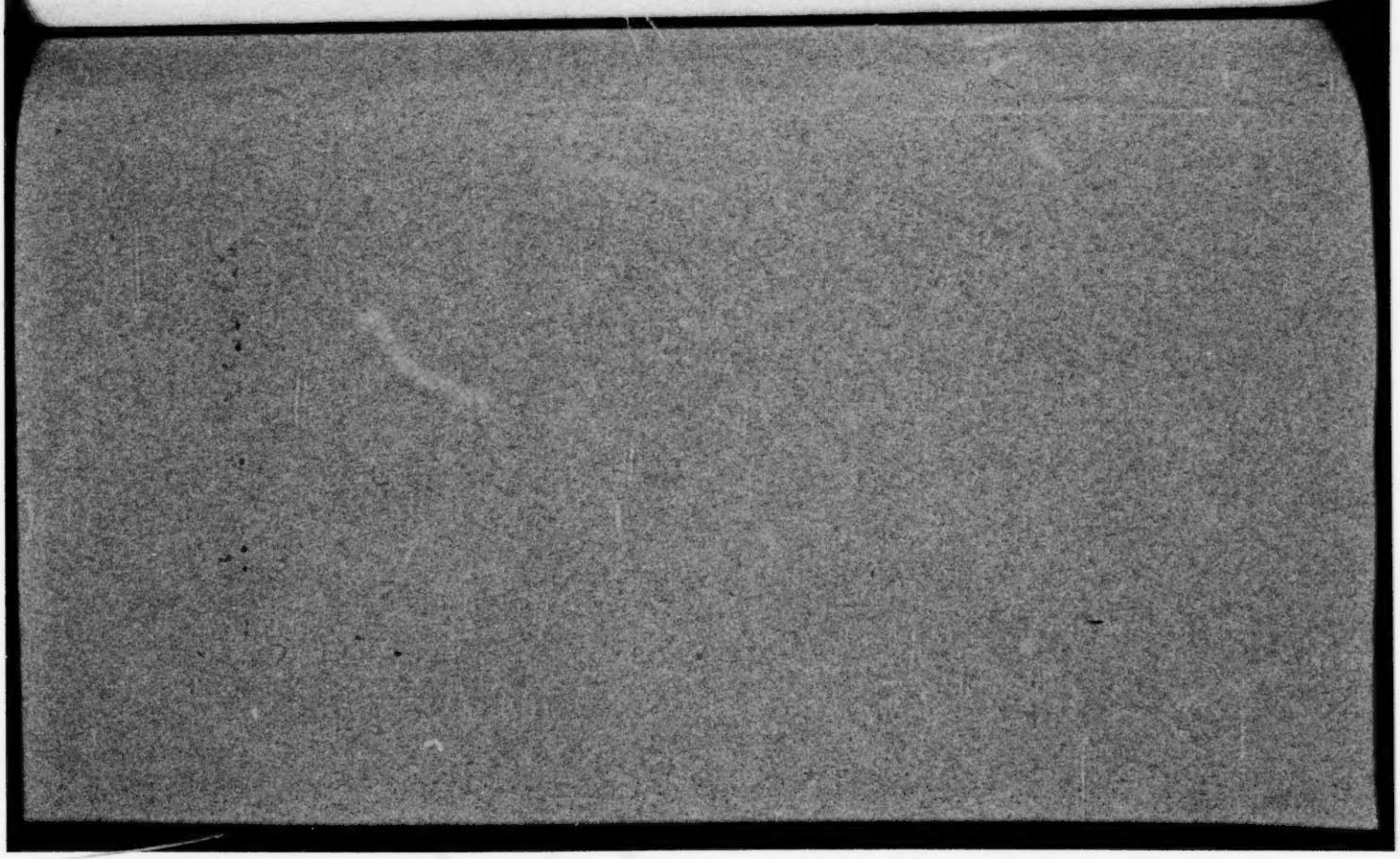

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IN COURT OF APPEALS OF GEORGIA

BILL OF EXCEPTIONS AND ORDER SETTLING SAME—Filed in Superior Court January 18, 1927; in Court of Appeals February 1, 1927

GEORGIA,
Fulton County:

Be it remembered that on the 19th day of October, 1925, there came on to be heard in the superior court of Fulton county, Georgia, at the September term, 1925, of said court, before Hon. E. D. Thomas, judge of said court presiding, the case of Mrs. Nora E. Hughes, Administratrix of Ira L. Hughes, deceased, against the Western & Atlantic Railroad, pending in said court. Said hearing was had on the demurrers of defendant to portions of the petition and amended petition of plaintiff. Pending argument thereof plaintiff withdrew, or had stricken, the second count of her petition, and the fourth and sixth counts which had been added to her petition by amendment, and plaintiff further amended her petition. Whereupon, on the 20th day of October, 1925, defendant filed and presented its demurrer to plaintiff's petition as finally amended, as above stated. Thereupon, after argument had, and on said 20th day of October, 1925, during said term, the court overruled the above mentioned demurrers of defendant, then and there urged as to those counts of plaintiff's petition as amended which had not been withdrawn or stricken, as above stated.

To which ruling of the court the defendant then and there excepted.

Thereafter, during said term and within thirty days of said ruling, the defendant tendered its bill of exceptions pendente lite to the said ruling, which was duly allowed, certified and filed.

And now comes said defendant and assigns error upon the said exceptions pendente lite and says that the court should have sustained each of its said grounds of demurrer, and that the court should have sustained all of said grounds, because each of said grounds was good and sufficient in law, for the reasons therein assigned.

[fol. 3] Be it further remembered, that at the November term, 1925, of said court, before Hon. W. D. Ellis, judge of said court, presiding, the said cause came on to be tried before the said judge and a jury, which trial resulted, on December 5th, 1925, during said term, in a verdict for plaintiff in the sum of seventeen thousand five hundred dollars.

Thereafter, during said term, defendant filed its duly approved motion for new trial which, after having been duly amended, was heard by the said judge, Hon. W. D. Ellis, and on June 21st, 1926, a new trial was by him granted.

Thereafter, at the September term, 1926, of said court, before Hon. E. E. Pomeroy, judge of said court, presiding, the said cause came on again to be heard, on October 4th, 1926.

During the progress of said cause, to wit, on October 4th, 1926, the plaintiff presented and had allowed by the court, subject to demurrer, another amendment to her petition, which amendment was on that day filed.

Thereupon the defendant demurred to said amendment, upon the grounds stated in said demurrer, and, on October 8th, 1926, the said demurrer was, by order of the court, overruled as to each and all of the grounds stated therein, to which ruling and order the defendant then and there excepted, and thereafter, at said term, and within thirty days of said ruling and order, presented its bill of exceptions pendente lite, which was duly allowed, certified and filed, assigning error on said ruling and order.

And now comes said defendant and assigns error upon said exceptions pendente lite and says that the court should have sustained each and should have sustained all of its said grounds of demurrer, because each of said grounds was [fol. 4] good and sufficient in law, for the reasons therein assigned.

Be it further remembered, that the said cause proceeded to trial, at said term, before Hon. E. E. Pomeroy, judge presiding, and a jury, which trial resulted in a verdict for plaintiff in the sum of ten thousand dollars.

Thereafter, during said term and within thirty days of the date of said verdict, the defendant filed its motion for new trial, after the same had been duly allowed and approved by the court; and thereafter, in accordance with the order of the court, defendant presented and had duly approved and filed an amendment to its said motion and a duly approved and filed brief of the evidence in said cause.

Thereupon, on the 18th day of December, 1926, the said motion for new trial, as so amended, came on to be heard before Hon. E. E. Pomeroy, judge presiding, and the same was, by him, on said day, overruled as to each and all the grounds thereof and a new trial was refused, to which ruling and order in accordance therewith the said defendant, now plaintiff in error, then and there excepted and now excepts and assigns the same as error.

And for more specific assignment of error, plaintiff in error says that each of said grounds of its motion for new trial, as amended, should have been sustained, because each of them was good and sufficient in law, and that the court erred in overruling all of said grounds and in not granting a new trial.

And plaintiff in error specifies as all of the record in said cause, material to a clear understanding of the errors complained of, the following:

The petition of plaintiff with each of the amendments thereto and dates of the filing thereof.

[fol. 5] The demurrers of defendant, with the dates of the filing thereof, and the orders of the court as to the same.

The charge of the court, upon the said trial of said cause at the September term, 1926; the verdict of the jury at said term; the motion for new trial made by defendant at said term, and order of the court thereon; the amendment to said motion; and the order of the court overruling said motion as amended.

Also, each of the bills of exceptions, pendente lite, herein above mentioned.

And plaintiff in error specifies as all of the evidence material to a clear understanding of the errors complained of, the said brief of evidence.

And now, within the time prescribed by law, comes the plaintiff in error, said Western & Atlantic Railroad, and tenders this its bill of exceptions and prays that the same may be signed and certified according to law and ordered to be transmitted to the current term of the Court of Appeals of Georgia, together with a transcript of such portions of the record and evidence as are herein specified, that the errors alleged to have been committed may be considered and corrected.

Western & Atlantic Railroad, by Tye, Peeples & Tye,
Its Attorneys-at-Law, residing at Atlanta, Ga.

I do hereby certify that the above and foregoing bill of exceptions is true and specifies all of the record and all of the evidence material to a clear understanding of the errors complained of, and the clerk of the superior court of Fulton county, Georgia, is hereby ordered to make out a complete [fol. 6] copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the current term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected. This January 12th, 1927.

Edgar E. Pomeroy, Judge Superior Court, Fulton County, Georgia.

Due and legal service within bill of exceptions acknowledged. Copy received this Jany. 18th, 1927.

Reuben R. & Lowry Arnold, Attys. for Defendant in Error.

[File endorsement omitted.]

GEORGIA,
Fulton County:

I hereby certify that the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, to wit: Western & Atlantic Railroad, plaintiff in error, vs. Mrs. Noa E. Hughes (Admx.), defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of said court affixed this the 31st day of Jany., 1927.

C. H. Brotherton, Deputy Clerk Superior Court, Fulton County, Georgia, ex-Officio Clerk City Court of Atlanta. (Seal.)

[fol. 7] [File endorsement omitted.]

[fol. 8] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed May 24, 1924

GEORGIA,
Fulton County:

To the Superior Court of said County:

The petition of Mrs. Nora E. Hughes, who brings this action as administratrix of her deceased husband, Ira L. Hughes, shows to the court the following case.

1. The defendant hereto is the Western & Atlantic Railroad Company, which is a railroad corporation running a line of track and having an office in said county of Fulton, State of Georgia, and the defendant receives and discharges freight and passengers in Fulton county, Georgia, as terminals therein and conducts generally in said county of Fulton all the business which a railroad company usually and customarily transacts and has officers and agents therein upon whom service of process may be made.

2. Said defendant had endamaged plaintiff in the sum of fifty thousand dollars ($50,000.00) on account of the case herein stated and judgment is prayed against said defendant for said sum of fifty thousand dollars ($50,000.00).

3. On the 25th day of April, 1923, and at about 8:40 o'clock in the morning, the plaintiff's intestate and decedent (who was her husband) Ira L. Hughes, was in the employ*ment* of the defendant company as a traveling fireman, the decedent's duties being to travel up and down the defendant's road on different engines of the defendant and to educate and instruct firemen as to their duties and to inspect and help take care of the engine, to see what, if any, troubles the engines have in a mechanical or other way, to inspect fully the engines at all points, and to make reports of his findings and of all defects and of other matters to the Master Mechanic and to see that engines are steaming properly, are being fired properly, and that in every way [fol. 9] their functions are being performed, and it was the right and duty of decedent to ride upon any and all engines of the defendant and any and all that he might see fit to get upon and to put in his time at this kind of work.

4. On April 25th, 1923, the decedent, pursuant to his duties, got upon the engine of a freight train of the defendant which left Chattanooga (known as the Station of Cravens in Tennessee) in Tennessee, at about 8:00 o'clock, the same being an engine pulling a freight train and being south bound to Atlanta, Georgia, and the engineer being one Ed Price, and the fireman being Will Kemp.

5. The decedent was busy about the engine in the cab until shortly before it reached Bridge No. 123, which is about twelve miles out from Chattanooga and which is in the State of Tennessee. Just before reaching said bridge, to wit: upon leaving Chickamauga, the decedent pursuant to his duties was proceeding to inspect the boiler, the cylinders, the steam chest and the front end of said engine, and to that end, he got out of the cab on the engineer's side and proceeded with his tour of inspection on the running board around the engine. It is shown to the court that inspections of the steam chest, the cylinders and the machinery of the front end of the engine can only be made when the engine is operating by getting out upon the running board and the same is provided for that purpose, there being also a method of getting around the front end of the engine.

6. The decedent, as aforesaid, started his tour of inspection on the engineer's side and proceeded around the running board on that side and then proceeded around the front end of the engine and got upon the running board on this fireman's side and was inspecting and looking closely at the moving and operating parts of the engine underneath him and around him and at the front end of the en- [fol. 10] gine. The decendent was very intent upon his duties and was absorbed with the said duties and they were necessary and important and he was using the running board provided by the defendant for such purposes.

7. Plaintiff shows that shortly before said engine reached Bridge No. 123, which is in the State of Tennessee and which spans Chickamauga Creek, that the engine passed over a dirt road some thirty to fifty feet before reaching said bridge and defendant negligently allowed a low place

to remain in the track at this point, to wit, a place which was not properly ballasted or supported underneath, and which was a low joint and which allowed the engine to give unduly and unnecessarily, to wit, four or five inches, and upon the engine striking said low place, it caused it to tilt and rock unduly, severely and dangerously and a few feet further on, to wit, about ten feet from the bridge, it struck another low similar joint, negligently allowed by the defendant to remain on the track on the left side, which added to the rocking motion of said engine on the track causing the top part of the engine to lean excessively on each side with each swing of the engine from time to time—the engine extending out on each of said swinging movements from side to side, from ten to twelve inches further than it should have moved had the train been in reasonably safe condition.

8. On account of said rocking motion of the engine from side to side and on account of the dangerous proximity of the side structure of the bridge (the bridge having posts upon the side and also having overhead pieces above), the decedent while so upon said running board, had his head thrown in contact with the upright side timbers of the bridge, was knocked off *of* the engine and fell into the river beneath and was killed then and there.

[fol. 11] 9. The defendant was negligent in the particulars hereinbefore stated and said negligence was the cause of the death of the decedent, to wit, it was negligent in the defendant to allow said low places to remain in the track just before the track entered said bridge. Said low places had been in existence upwards of three weeks and the defendant in the exercise of ordinary care should have known thereof and was negligent in not repairing said condition and making said track reasonably smooth. Said condition at said place consisted in a lack of ballast and earth or other substantial material in the track at the end of two joints and the same consequently with the constant motion of trains over them had become sprung and low and weak and with the weight of the train gave way as aforesaid four or five inches, causing the engine to rock from side to side and said condition was especially dangerous just before the entrance to said bridge.

10. Plaintiff further shows to the court that the defend ant was negligent in the construction of said bridge in that upright pieces on this side of said bridge would only clear an engine some twelve or fourteen inches and on the occasion in question, the engine was a large freight engine which projected out over the side of the track four to five inches further than the defendant's average engines and allowed a clearance therefore of considerably under a foot which was a dangerous condition and imperiled the lives of employees who were compelled to perform their duties on the running board of engines and keep lookouts out of the side of cabooses and perform like services. It is shown to the court that the decedent was absorbed in his duties of inspection at said time and it is further shown to the court that except by actual measurement it was impossible for employees passing by said bridge to know the [fol. 12] exact distance of the same from the side of trains and the defendant had never warned the decedent of any danger from said bridge and it is shown to the court that the defendant was further negligent in not warning its employees especially those working upon large engines such as this was of the close proximity of said bridge to the track and was likewise negligent in maintaining said dangerous low places in the track and in not warning employees that said low places existed.

11. On account of each and all of the foregoing negligent acts and omissions of the defendant, the death of the decedent occurred.

12. This, the first count, is brought under the act of Congress regulating the liability of interstate carriers to its employees engaged in Interstate Commerce and plaintiff alleges that the decedent was engaged in Interstate Commerce at the time of his death and the defendant and the said engine and train on which the decedent was riding were engaged in Interstate Commerce and the said train was proceeding from the State of Tennessee into the State of Georgia and was carrying freight destined from Tennessee into Georgia and was carrying freight and other articles, including the cars and the train itself, from one State in the Union into another State.

13. Plaintiff brings this action for such damages as are allowed under the Act of Congress aforesaid and she avers that her husband was 34 years of age and had an expectancy in life of 31.68 years, and was able to and did earn a salary of about $200.00 per month and in addition was paid his expenses while out on the road and plaintiff avers that his earnings would have increased with time. She alleges that he left surviving him as his widow, plaintiff, who is 33 years of age and one minor child, to wit: a son 8 years [fol. 13] of age. Plaintiff alleges that her husband contributed practically all he earned to his family, to wit: plaintiff, the wife, and said son, and they were dependent upon him, and his life was of great value to them.

This action is brought for the benefit of the plaintiff, the widow and of said child, and they ask that such damages be allowed them under the facts herein pleaded as are allowed by the Act of Congress under which this court is brought and they aver that the decedent contributed and would have continued to contribute throughout his entire expectancy practically all of his earnings to the wife and child and they lay their damages at fifty thousand ($50,000.00).

Wherefore plaintiff prays that process may issue requiring defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Reuben R. Arnold, Lowry Arnold, Fred Mayfield,
Plaintiff's Attys.

Second Count

(Second Count withdrawn.)

* * * * * * *

Wherefore plaintiff prays that process may issue requiring defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Reuben R. Arnold, Lowry Arnold, Fred Mayfield,
Plaintiff's Attys.

[File endorsement omitted.]

[fol. 14] In Superior Court of Fulton County

Amended Petition—Filed June 14, 1924

Georgia,
Fulton County:

And now comes the plaintiff in the above stated case and amends her original petition in said case, and by way of amendment says:

1. Plaintiff amends paragraph one (1) in the first court of said petition by striking from said paragraph the word Company immediately following the words Western & Atlantic Railroad in lines one and two of said paragraph, so that the name of the defendant shall read the Western & Atlantic Railroad.

* * * * * * *

R. R. Arnold & Lowry Arnold, Plff's Attys.

Read and considered. The above and foregoing amendment is hereby allowed, and ordered filed and made a part of the record in said case. This 14th day of June, 1924.

John D. Humphries, Judge S. C. A. C.

I hereby acknowledge receipt of a copy of the above and foregoing amendment and order of court allowing same. All other and further service waived. This 14th day of June, 1924.

Tye, Peeples & Tye, Attys. for Deft.

[File endorsement omitted.]

[fol. 15] In Superior Court of Fulton County

Demurrer to 1st Count—Filed July 5, 1924

Georgia,
Fulton County:

Now comes defendant and demurs to the First Count of the petition of plaintiff in the above stated case and for grounds of demurrer, says:

1. It demurs to the allegations of the 10th paragraph of said count as to the construction of the bridge and dece-

dent being absorbed in his duties, upon the ground that the allegations of fact therein do not show that plaintiff's intestate did not assume the risk of the danger alleged therein arising from the construction of the bridge, it being nowhere alleged by the said count that he was unaccustomed to have to pass through said bridge with engine as large as that upon which he was when struck, or that the construction of the bridge had been changed at any time recently before his injury, or that he was not familiar with the clearance of the upright pieces of the bridge, or that he had been out a short time employed by defendant or but a short time accustomed to pass through said bridge as such employee. The allegations of said count show that he was with his back to said bridge when struck and that he received the fatal injury in the day time. No sufficient reason or excuse is alleged in said count for decedent being so absorbed in his duties at the particular time and place when and where he was struck as to relieve him from assumption of the risk of the construction of the bridge, or from being mindful of the perilous nature of the position in which he had placed himself; nor is there any allegations showing any urgency or necessity for him to make the alleged tour of inspection at the time and place alleged, or to cause him to be so absorbed as not to be mindful of his perilous situation.

2. It demurs to the allegations of the said paragraph as [fol. 16] to defendant not having warned decedent of danger from the bridge or of the close proximity of the bridge to the track because it is not alleged that decedent did not know of danger from the bridge or of the close proximity of the bridge to the track.

Further because the allegations made in said court are not sufficient to show that there was a duty upon defendant to so warn decedent, or that decedent did not assume the risk of such construction and such proximity.

Wherefore it prays that this demurrer be sustained and the portions of said count demurred to be stricken.

Tye, Peeples and Tye, Attys. for Deft.

(Demurrer to Second Count Omitted.)

* * * * * * *

[File endorsement omitted.]

In Superior Court of Fulton County

Amended Petition—Filed August 12, 1925

Georgia,
Fulton County:

And now comes the plaintiff in the case above stated, Mrs. Nora E. Hughes, administratrix of the estate of Ira L. Hughes, deceased, and adds by way of amendment to said petition the following four counts; the first amended count being known as the "Third Count;" the second amended count being known as the "Fourth Count;" the third amended count being known as the "Fifth Count," and the fourth amended count being known as the "Sixth Count."

[fol. 17] Third Count

Georgia,
Fulton County:

To the Superior Court of said County:

The petition of Mrs. Nora E. Hughes, who brings this action as administratrix of her deceased husband, Ira L. Hughes, shows to the court the following case:

1. The defendant hereto is the Western & Atlantic Railroad, which is a railroad corporation running a line of track and having an office in said county of Fulton, State of Georgia, and the defendant receives and discharges freight and passengers in Fulton county, Georgia, at terminals therein, and conducts generally in said county of Fulton all the business which a railroad company usually and customarily transacts, and has officers and agents therein upon whom service of process may be made.

2. Said defendant has endamaged plaintiff in the sum of fifty thousand ($50,000.00) dollars on account of the case herein stated, and judgment is prayed against said defendant for same sum of fifty thousand ($50,000.00) dollars.

3. On the 25th day of April, 1923, and at about 8:40 o'clock in the morning, the plaintiff's intestate and decedent (who was her husband) Ira L. Hughes, was in the employment of the defendant company as a traveling fireman, the decedent's duties being to travel up and down the

defendant's road on different engines of the defendant and to educate and instruct fireman as to their duties and to inspect and help take care of the engine, to see what, if any, troubles the engines have in a mechanical or other way, to inspect fully the engines at all points, and to make reports of his findings and of all defects and of other matters to the Master Mechanic and to see that engines are steaming properly, are being fired properly and that in every way [fol. 18] their functions are being performed and it was the right and duty of decedent to ride upon any and all engines of the defendant and any and all that he might see fit to get upon and to put in his time at this kind of work.

4. On April 25th, 1923, the decedent pursuant to his duties, got upon the engine of a freight train of the defendant which left Chattanooga (known as the Station of Cravens in Tennessee) in Tennessee, at about 8:00 o'clock, the same being an engine pulling a freight train and being southbound to Atlanta, Georgia, and the engineer being one Ed. Price, and the fireman being Will Kempt.

5. The decedent was busy about the engine in the cab until shortly before it reached Bridge No. 123, which is about twelve miles out from Chattanooga, and which is in the State of Tennessee. Just before reaching said bridge, to wit: upon leaving Chickamauga, the decedent pursuant to his duties was proceeding to inspect the boiler, the cylinders, the steam chest and the front end of said engine and to that end, he got out of the cab on the engineer's side and proceeded with his tour of inspection on the running board of the engine. It is shown to the court that inspections of the steam chest, the cylinders and the machinery of the front end of the engine can only be made when the engine is operating by getting out upon the running board, and the same is provided for that purpose, there being also a method of getting around the front end of the engine.

6. The decedent, as aforesaid, started his tour of inspection on the engineer's side and proceeded around the running board on that side and then proceeded around the front end of the engine and got upon the running board on the fireman's side and inspected and looked closely at the moving and operating parts of the engine on that side, and then [fol. 19] proceeded to get back into the caboose in the way provided for employees to get back into said caboose. The

way provided for employees to get back into said caboose was to go around the fireman's side of the caboose, there being a contrivance in the way of a handhold on the top of the side of the caboose on the fireman's side by which one could hold with his hand, and there being a foot way on which one could place his feet and step on to the side of said caboose, this being the way and method provided for employees to get from the front of the engine into the caboose, and the same being the way used customarily and ordinarily with the defendant's knowledge.

7. It is also shown to the court that shortly before the said engine reached Bridge No. 123, which is in the State of Tennessee and which spans Chickamauga Creek, that the engine passed over a dirt road some thirty to fifty feet before reaching said bridge, and defendant negligently allowed a low place to remain in the track at this point, to wit: a place which was not properly ballasted or supported underneath, and which was a low joint and which allowed the engine to give unduly and unnecessarily, to wit, four or five inches, and upon the engine striking said low place, it caused it to tilt and rock unduly, severely and dangerously and a few feet further on, to wit, about ten feet from the bridge, it struck another low, similar joint, negligently allowed by the defendant to remain on the track on the left side, which added to the rocking motion of said engine on the track causing the topmost part of the engine to lean excessively on each side with each swing of the engine from side to side,—the engine extending out on each of said swinging movements from side to side from ten to twelve inches further than it should have extended had the train been in reasonably safe condition.

[fol. 20] 8. On account of the said dangerous proximity of the side structure of said bridge, (the bridge having posts upon the side and also having overhead pieces above), and also on account of the great width of said engine, as aforesaid, and also on account of said excessive rocking motion of said engine from side to side, the decedent while so engaged in passing around said caboose and into the same, had his head and parts of his body thrown in contact with the upright side timbers of the bridge, was knocked off of the engine, and fell into the river beneath and was then and there killed.

9. The defendant was negligent in the particulars hereinbefore stated and said negligence was the cause of the death of the decedent, to wit: it was negligent in the construction of said bridge to allow said upright pieces on the side of said bridge to only clear an engine some twelve or fourteen inches, and on the occasion in question the engine was a large freight engine which projected out over the side of the track four to five inches further than the defendant's average engines and allowed a clearance therefore of considerably under a foot, which was a dangerous condition and imperiled the lives of employees who were compelled to be out on the engine and get back into the caboose in the manner in which the decedent did.

It is shown to the court that it required all of decedent's care and attention to get safely back into said caboose in the manner aforesaid, and it is also shown that except by actual measurement it was impossible for employees passing by said bridge to know the exact distance of the same from the side of trains or engines, and defendant had never warned the decedent of any danger from said bridge, and it is shown to the court that the defendant was further negligent in not warning its employees, especially those working [fol. 21] upon large engines such as this, of the close proximity of said bridge to the track, and it is further shown that defendant was likewise negligent in maintaining said dangerous low places in the track, and in not warning employees that said low places existed, and in allowing them to remain in existence upwards of three weeks. It is alleged that the defendant in the exercise of ordinary care should have known thereof and was negligent in not repairing said condition and making said track reasonably smooth. Said conditions at said place consisted in a lack of ballast and earth and other substantial material in the track at the end of said two joints, and the same consequently with the constant motion of trains over them had become sprung and low and weak, and with the weight of the train gave way, as aforesaid, four or five inches, causing the engine to rock from side to side, and said condition was especially dangerous just before the entrance to said bridge.

10. On account of each and all of the foregoing negligent acts and omissions of the defendant, the death of the decedent occurred.

11. This, the third count, is brought under the Act of Congress regulating the liability of interstate carriers to its employees engaged in Interstate Commerce and plaintiff alleges that the decedent was engaged in Interstate Commerce at the time of his death and the defendant and the said engine and train on which the decedent was riding were engaged in Interstate Commerce and the said train was proceeding from the State of Tennessee into the State of Georgia, and was carrying freight destined from Tennessee into Georgia, and was carrying freight and other articles, including the cars and the train itself, from one State in the Union into another State.

[fol. 22] 12. Plaintiff brings this action for such damages as are allowed under the Act of Congress aforesaid, and she avers that her husband was 34 years of age, and had an expectancy of life of 31.68 years, and was able to and did earn a salary of about $200.00 per month, and in addition was paid his expenses while out on the road, and plaintiff avers that his earnings would have increased with time. She alleges that he left surviving him as his widow, plaintiff, who is 33 years of age and one minor child, to wit, a son eight years of age. Plaintiff alleges that her husband contributed practically all he earned to his family, to wit, plaintiff, the wife, and said son, and they were dependent upon him, and his life was of great value to them.

This action is brought for the benefit of the plaintiff, the widow, and of said child, and they ask that such damages be allowed them under the facts herein pleaded as are allowed by the Act of congress under which this count is brought and they aver that the decedent contributed and would have continued to contribute throughout his entire expectancy practically all of his earnings to the wife and child, and they lay their damages at fifty thousand ($50,000.00) dollars.

Wherefore plaintiff prays that process may issue requiring defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Reuben R. and Lowry Arnold, Fred Mayfield, Pl'ff's Attys.

(Count Four having been withdrawn the same is omitted.)

* * * * * * *

[fol. 23] Fifth Count

GEORGIA,
Fulton County:

To the Superior Court of said County:

The petition of Mrs. Nora E. Hughes, who brings this action as administratrix of her deceased husband, Ira L. Hughes, shows to the court the following case:

1. The defendant hereto is the Western & Atlantic Railroad, which is a railroad corporation running a line of track and having an office in said county of Fulton, State of Georgia, and the defendant receives and discharges freight and passengers in Fulton County, Georgia, at terminals therein and conducts generally in said county of Fulton all the business which a railroad company usually and customarily transacts and has officers and agents therein upon whom service of process may be made.

2. Said defendant has endamaged plaintiff in the sum of fifty thousand ($50,000.00) dollars on account of the case herein stated and judgment is prayed against said defendant for said sum of fifty thousand dollars ($50,000.00).

3. On the 25th day of April, 1923, and at about 8:40 o'clock *on* the morning, the plaintiff's intestate and decedent (who was her husband) Ira L. Hughes, was in the employment of the defendant company as a traveling fireman, the decedent's duties being to travel up and down the defendant's road on different engines of the defendant and to educate and instruct fireman as to their duties and to inspect and help take care of the engine, to see what, if any, troubles the engines have in a mechanical or other way, to inspect fully the engines at all points, and to make reports of his findings and of all defects and of other matters to the Master Mechanic and to see that engines are steaming properly, are being fired properly and that in every way [fol. 24] their functions are being performed and it was the right and duty of decedent to ride upon any and all engines of the defendant and any and all that he might see fit to get upon and to put in his time at this kind of work.

4. On April 25th, 1923, the decedent pursuant to his duties, got upon the engine of a freight train of the defendant

which left Chattanooga (known as the Station of Cravens in Tennessee) in Tennessee, at about 8:00 o'clock, the same being an engine pulling a freight train and being southbound to Atlanta, Ga., and the engineer being one Ed. Price and the fireman being Will Kemp.

5. The decedent was busy about the engine in the cab until shortly before it reached Bridge No. 123, which is about twelve miles out from Chattanooga and which is in the State of Tennessee. Just before reaching said bridge, to wit, upon leaving Chickamauga, the decedent pursuant to his duties was proceeding to inspect the boiler, the cylinders, the steam chest and the front end of said engine and to that end, he got out of the cab on the engineer's side and proceeded with his tour of inspection on the running board around the engine. It is shown to the court that inspections of the steam chest, the cylinders and the machinery of the front end of the engine can only be made when the engine is operating by getting out upon the running board and the same is provided for that purpose, there being also a method of getting around the front end of the engine.

6. The decedent, as aforesaid, started his tour of inspection on the engineer's side and proceeded around the running board on that side and then proceeded around the front end of the engine and got upon the running board on the fireman's side and was inspecting and looking closely at the moving and operating parts of the engine underneath him and around him and at the front end of the [fol. 25] engine. The decedent was very intent upon his duties and was absorbed with the said duties and they were necessary and important and he was using the running board provided by the defendant for such purposes.

7. Plaintiff shows that shortly before said engine reached Bridge No. 123, which is in the State of Tennessee and which spans Chickamauga Creek, that the engine passed over a dirt road some thirty to fifty feet before reaching said bridge and defendant negligently allowed a low place to remain in the track at this point, to wit, a place which was not properly ballasted or supported underneath, and which was a low joint and which allowed the engine to give unduly and unnecessarily, to wit, four or five inches, and

upon the engine striking said low place, it caused it to tilt and rock unduly, severely and dangerously and a few feet further on, to wit, about ten feet from the bridge, it struck another low, similar joint, negligently allowed by the defendant to remain on the track on the left side, which added to the rocking motion of said engine on the track causing the top part of the engine to lean excessively on each side with each swing of the engine from time to time, the engine extending out on each of said swinging movements from side to side, from ten to twelve inches further than it should have moved had the train been in reasonably safe condition.

8. On account of the said rocking motion of the engine from side to side, the decedent, while so upon said running board, was unbalanced and thrown from said engine and fell into the river beneath and was then and there killed.

9. The defendant was negligent in the particulars hereinbefore stated and said negligence was the cause of the death of the decedent, to wit: it was negligent in the defendant to allow said low places to remain in the track just [fol. 26] before the track entered said bridge. Said low places had been in existence upwards of three weeks and the defendant in the exercise of ordinary care should have known thereof and was negligent in not repairing said condition and making said track reasonably smooth. Said conditions at said place consisted in a lack of ballast and earth or other substantial material in the track at the end of two joints and the same consequently with the constant motion of trains over them had become sprung and low and weak and with the weight of the train gave way as aforesaid, four or five inches, causing the engine to rock from side to side and said condition was especially dangerous just before the entrance to said bridge.

10. On account of each and all of the foregoing negligent acts and omissions of the defendant, the death of the decedent occurred.

11. This, the fifth count, is brought under the Act of Congress regulating the liability of interstate carriers to its employees engaged in Interstate Commerce and plaintiff alleges that the decedent was engagd in Interstate Commerce

at the time of his death and the defendant and the said engine and train on which the decedent was riding were engaged in Interstate Commerce and the said train was proceeding from the State of Tennessee into the State of Georgia, and was carrying freight and other articles, including the cars and the train itself, from one State in the Union into another State.

12. Plaintiff brings this action for such damages as are allowed under the Act of Congress aforesaid and she avers that her husband was 34 years of age and had an expectancy in life of 31.68 years and was able to and did earn a salary of about $200.00 per month and in addition was paid his expenses while out on the road and plaintiff avers that his earnings would have increased with time. She alleges that [fol. 27] he left surviving him as his widow, plaintiff, who is 33 years of age and one minor child, to wit, a son 8 years of age. Plaintiff alleges that her husband contributed practically all he earned to his family, to wit: plaintiff, the wife, and said son, and they were dependent upon him, and his life was of great value to them. This action is brought for the benefit of the plaintiff, the widow, and of said child, and they ask that such damages be allowed them under the facts herein pleaded as are allowed by the Act of Congress under which this count is brought and they aver that the decedent contributed and would have continued to contribute throughout his entire expectancy practically all of his earnings to the wife and child and they lay their damages at fifty thousand ($50,000.00) dollars.

Wherefore plaintiff prays that process may issue requiring defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Reuben R. Arnold, Lowry Arnold, Fred Mayfield,
Pl'ff's Attys.

(Count Sixth having been withdrawn the same is omitted.)

* * * * * * *

The foregoing amendment is hereby allowed and ordered filed and made a part of the record of said case, subject to

defendant's right to demur thereto. This 12th day of August, 1925.

Geo. L. Bell, Judge S. C. A. C.

Service of foregoing amendment and order allowing same by copy asknowledged this August 12, 1925.

Tye, Peeples & Tye, Def't's Attys.

[fol. 28] [File endorsement omitted.]

In Superior Court of Fulton County

Demurrer to Amended Petition—Filed September 29, 1925

Georgia,
Fulton County:

Now comes the defendant in the above stated case and demurs to the amendment of plaintiff to her petition adding third, fourth, fifth and sixth counts thereto, and for grounds of demurrer says:

(Demurrer to the Third Count)

1. It demurs to the allegations of paragraph 9 of said count as to negligence of defendant in the construction of the bridge, and as to failure of the defendant to warn decedent of any danger from said bridge or of the close proximity of the bridge to the track, upon the ground that the allegations of fact in said count do not show that the plaintiff's intestate did not assume the risk of the danger alleged therein arising from the construction of the bridge, it being nowhere alleged in said count that he was unaccustomed to have to pass through said bridge with engines as large as that upon which he was when struck, and that the construction of the bridge had been changed any time recently before his injury, or that he was not familiar with the clearance of the upright pieces of the bridge, or that he had been but a short time employed by defendant or but a short time accustomed to pass through said bridge as such employee. The allegations of said count show that he was with his back to said bridge when struck and that he received the

fatal injury in the day time. No sufficient reason or excuse is alleged in said count for decedent being so absorbed [fol. 29] in his duties at the particular time and place when and where he was struck as to relieve him from assumption of the risk of the construction of the bridge, or from being unmindful of the perilous nature of the position in which he had placed himself; nor is there any allegation showing any urgency or necessity for him to make the alleged tour of inspection at the time and place alleged or to cause him to be so absorbed as not to be mindful of his perilous situation.

2. It demurs to the allegations of said paragraph as to defendant not having warned decedent of danger from the bridge or of the close proximity of the bridge to the engine, because it is not alleged that decedent did not know of danger from the bridge or of the close proximity of the upright pieces on the side of the bridge to the engine. Further, because the allegations made in said count are not sufficient to show that there was a duty upon defendant to so warn decedent, or that decedent did not assume the risk of such construction and such proximity.

Wherefore defendants pray that this demurrer be sustained and the portions of said count demurred to be stricken.

(Demurrer to Fourth Count Omitted.)

* * * * * * *

Demurrer to Fifth Count

1. Defendant demurs to the allegations of paragraph 6 of said count, that decedent was very intent upon his duties and was absorbed with the said duties and they were necessary and important, upon the ground that the allegations of fact made do not show that decedent was unaccustomed [fol. 30] to pass through said bridge upon engines of defendant as large as that upon which he was when struck, or that the structure of the bridge had been changed at any time recently before his injury or that he was not familiar with the clearance of the upright pieces of the bridge, or that he

had been but a short time accustomed to pass through said bridge as such employee. The allegations of said count show that he was with his back to said bridge when struck, and that he received the fatal injury in the day time. No sufficient reason or excuse is alleged in said count for decedent being so absorbed in his duties at the particular time and place when and where he was struck as to relieve him from assumption of the risk of the construction of the bridge, or from being mindful of the perilous nature of the position in which he had placed himself, nor is there any allegation showing any urgency or necessity for him to make the alleged tour of inspection at the time and place alleged, or to cause him to be so absorbed as not to be mindful of his parilous situation.

Wherefore defendant prays that this demurrer be sustained and the portions of this count demurred to be stricken.

(Demurrer to Sixth Count Omitted.)

* * * * * * *

Tye, Peeples and Tye, Attys. for Deft.

[File endorsement omitted.]

[fol. 31] In Superior Court of Fulton County

Order Striking Counts 2, 4, and 6

Plaintiff having withdrawn counts two, four, and six, it is ordered by the court that said counts be stricken from the petition. This Oct. 20, 1925.

E. D. Thomas, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

AMENDMENT TO PETITION—Filed October 20, 1925

GEORGIA,
Fulton County:

Amending each of the three counts of the petition in above case plaintiff alleges that the decedent had no knowledge of the close proximity of said bridge or the side structure thereof and had no knowledge as to the distance between the side of the engine and the side of said bridge.

R. R. & Lowry Arnold, J. F. Mayfield, Pl'ff's Attys.

Amendment allowed and order filed Oct. 20, 1925.

E. D. Thomas, Judge S. C. A. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

AMENDMENT TO DEMURRER—Filed October 20, 1925

GEORGIA,
Fulton County:

Now comes the defendant in the above stated cause and, the plaintiff having on the 20th day of Oct., 1925, amended her petition, renews its demurrer to said petition as so [fol. 32] amended, and says that said petition as so amended is still defective as pointed out in its demurrer heretofore filed.

Defendant says that it is not sufficient to relieve a servent from assumption of risk as to the proximity of permanent structures on his master's premises that he may not actually know the distance of such structures from the place where he is accustomed to work. If such a structure or portions thereof, a railroad bridge, within the observation of a man of ordinary care, is so near to side of an engine, which is itself no wider than those on which the servant has been accustomed to pass through the bridge, as to make it unsafe for him to remain on the outside of the engine while it is

passing through the bri:ge, then the servant assumes the risk of so doing, though he, himself, may not actually know the width of the bridge or the distance of such portion of the bridge from the engine or track. Under such conditions his knowledge must be assumed against him. He not only must not actually know but he is chargable with a knowledge of the peril if plainly observable.

Tye, Peeples and Tye, Atty. for Deft.

[File endorsement omitted.]

In Superior Court of Fulton County

Order Overruling Demurrers

The demurrers to the petition as amended are overruled. October 20th, 1925.

E. D. Thomas, Judge S. C. A. C.

[fol. 33] In Superior Court of Fulton County

Exceptions Pendente Lite—Filed October 23, 1925

Georgia,
Fulton County:

Be it remembered that on the 19th day of October, 1925, during the September term, 1925, of the superior court of said county, before the Honorable E. D. Thomas, judge of said court, presiding, there came on to be heard the case of Mrs. Nora E. Hughes, Administratrix of Ira L. Hughes, deceased, vs. Western & Atlantic Railroad, pending in said court. On said day above mentioned the demurrers of defendant to portions of the petition, and amended petition, of plaintiff were argued, said argument continuing into the following day. Pending said argument, plaintiff withdrew, or had stricken, the second count of her petition, and the fourth and sixth counts which had been added to her petition by amendment, and plaintiff further amended her petition. Whereupon, on the 20th day of October, 1925, the

defendant filed and presented its demurrer to plaintiff's petition as finally amended, as above stated. Thereupon, after argument had, and on said 20th day of October 1925, during said September term, 1925, the court overruled the above mentioned demurrers of defendant, then and there urged as to those counts of plaintiff's petition as amended which had not been withdrawn by plaintiff or stricken. To which ruling of the court the defendant then and there excepted, and now excepts, and assigns the same as error.

And for more specific assignment of error defendant says that the court should have sustained each of its said grounds of demurrer, and that the court should have sustained all of said grounds of demurrer, because each of said grounds of demurrer was good and sufficient in law, and defendant says further that all of said grounds of demurrer were good and sufficient in law.

[fol. 34] Wherefore, now comes the defendant, Western & Atlantic Railroad, during the term at which the ruling complained of was made, and tenders this its bill of exceptions pendente lite, and prays that the same may be signed and certified and ordered of record, as provided by law, in order that the errors alleged to have been committed may be considered and corrected.

Tye, Peeples and Tye, Attys. for Deft.

I hereby certify that the above and foregoing bill of exceptions pendente lite is true, and the clerk of the superior court of Fulton county, Ga., is hereby directed and ordered to enter said bill of exceptions and this certificate upon the minutes of said court, as provided by law. This Oct. 23rd, 1925.

E. D. Thomas, Judge S. C. A. C.

[File endorsement omitted.]

In Superior Court of Fulton County

Amendment to Petition—Filed Oct. 4, 1926

Georgia,
Fulton County:

By leave of the court plaintiff amends the petition as to each count as follows:

1. The decedent prior to his death, contributed his services to plaintiff and his child as follows:

The decedent performed various domestic services about the household, such as cooking, washing the dishes, waiting upon plaintiff while she was sick, and also did carpenter work and made repairs about the house and premises, [fol. 35] milched the cows, churned, worked the garden, looked after the poultry yard and his services in these particulars were worth $30.00 per month and upward.

2. Also decedent gave special attention to the education and training of his young son, and helped with his lessons at night in the way of going over said lessons with his son, said services being of the value of ten dollars per month.

Reuben R. & Lowry Arnold, J. F. Mayfield, Pl'ffs Attys.

Amendment allowed and ordered filed, subject to demurrer. Oct. 4th, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

[File endorsement omitted.]

In Superior Court of Fulton County

Demurrer to Amended Petition

Georgia,
Fulton County:

Now comes the defendant in the above stated case and demurs to the amendment to plaintiff's petition therein, being that amendment allowed by the court, subject to de-

murrer, on October 4, 1926, and filed on said Oct. 4, 1926, and for grounds of demurrer, says:

1. It demurs to the paragraph of said amendment numbered 1, on the ground that the allegations thereof as to the nature of the domestic services claimed to have been rendered by the decedent is too vaguely stated and set forth [fol. 36] in said paragraph, and that the same is true as to the carpenter work and repairs and other work claimed in said paragraph to have been performed by the decedent.

Further, because there is no statement in said paragraph sufficiently specific to show what the services of the decedent were worth, or why they were worth the amount alleged, and because there is no specification or itemization of the particular service and the value of the various kinds or items of service.

2. Defendant demurs, also, to the paragraph numbered 2 of said amendment, upon the ground that the Act of Congress known as the Employers' Liability Act does not provide for or contemplate the allowance of damages such as are claimed in said paragraph.

Further, because the allegations of said paragraph as to what the decedent gave to his son or how the decedent helped his son are too vague, general and indefinite to afford a sufficient basis for the allowance of damages therefor.

Further, because there is no sufficient showing in said paragraph as to why the alleged services were of the value of ten dollars a month. There is not even an allegation that it would have been necessary to pay ten dollars a month to another to perform said services.

Wherefore defendant prays that this demurrer be sustained and the amendment stricken.

Tye, Peeples and Tye, Attys. for Deft.

In Superior Court of Fulton County

Order Overruling Demurrer

The within demurrer coming on to be heard. It is ordered that the same be and it is hereby overruled. This Oct. 8th, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

[fol. 37] In Superior Court of Fulton County

Verdict

We, the jury, find for the plaintiff — the sum of $10,000.00. Oct. 8th, 1926.

W. E. Cobble, Foreman.

In Superior Court of Fulton County

Judgment

Whereupon, it is considered, ordered and adjudged by the court that the plaintiff do have and recover from the defendant, the Western & Atlantic Railroad Co., the sum of ten thousand ($10,000.00) dollars, principal and all costs of court. This 11th day of Oct., 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

Reuben R. & Lowry Arnold, Attys. for Pl'ff.

In Superior Court of Fulton County

Exceptions Pendente Lite—Filed Oct. 12, 1926

Georgia,

Fulton County:

Be it remembered that at the September term, 1926, of the superior court of said county, on the 4th day of October, 1926, before Hon. E. E. Pomeroy, judge of said court presiding, there came on to be tried, the cause of Mrs. Nora E. Hughes, as administratrix of Ira L. Hughes, deceased, vs. Western & Atlantic Railroad, pending in said court.

During the progress of said cause, to wit on October 4th, 1926, the plaintiff presented and had allowed by the court, subject to demurrer, an amendment to her petition, which amendment was on said day filed.

Thereupon the defendant demurred to said amendment upon the grounds stated in said demurrer, and, on Oct. 8, 1926, the said demurrer was, by order of the court, overruled as to each and all of the grounds stated therein, to

[fol. 38] which ruling and order the defendant then and there excepted and now excepts and assigns the same as error.

And for more specific assignment of error defendant says that each and all of the grounds of said demurrer were good and sufficient in law and should have been sustained.

And now comes the defendant at the term of the court at which said ruling and order complained of was made and within thirty days of the date thereof and presents this its bill of exceptions pendente lite, and prays that the same may be signed and certified and ordered of record as provided by law, that the errors alleged to have been committed may be considered and corrected.

Tye, Peeples and Tye, Attys. for W. & A. R. R.

I do hereby certify that the above and foregoing bill of exceptions pendente lite is true and the clerk of the superior court of Fulton County, Ga., is hereby ordered to record the same together with this certificate and order upon the minutes of said court as provided by law. This Oct. 12th, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 39] In Superior Court of Fulton County

Amended Judgment

In the case above stated, in entering judgment, by inadvertence, the word "Company" was put after the name of Western & Atlantic Railroad; and the court here and now, at the same term, corrects said judgment, and amends the same so that the same shall read as follows:

Whereupon, It is considered and adjudged by the court, that the plantiff, Mrs. Nora E. Hughes, Administratrix of the estate of Ira L. Hughes, recover of the Western & Atlantic Railroad the sum of ten thousand dollars ($10,000.00). This Oct. 12, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

MOTION FOR NEW TRIAL—Filed Oct. 12, 1926

GEORGIA,
Fulton County:

Now comes the defendant in the above stated cause, at the term of court at which said verdict was rendered and within thirty days of the date of the rendition thereof, and, being dissatisfied with said verdict, presents this its motion for the setting aside of said verdict and the granting of a new trial in said cause, upon the following grounds:

1. Because said verdict was contrary to law.

2. Because said verdict was contrary to the evidence.

3. Because said verdict was contrary to the strong and decided weight of the evidence.

Wherefore, defendant prays that an order be granted calling upon plaintiff to show cause why the said verdict should not be set aside, and that a new trial be ordered after hearing upon this motion.

[fol. 40] And movant will ever pray, etc.

Tye, Peeples and Tye, Attys. for Movant.

The recitals of fact in the foregoing motion for new trial are approved as true, let said motion be filed and a copy thereof and of this order be served upon counsel for plaintiff.

It is ordered that plaintiff show cause before me at 9:30 o'clock a. m., Saturday, December 18th, 1926, or as soon thereafter as counsel can be heard, why the motion should not be granted and a new trial be ordered.

It is further ordered that movant have until the final hearing upon said motion to prepare, present and have approved a brief of the evidence in said cause and to amend its said motion for new trial.

A supersedeas is granted and allowed in said case until the further order of this court. This Oct. 12th, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

Due and legal service of the above motion and order acknowledged. Copy received. Further service waived. This Oct. 12, 1926.

R. R. & Lowry Arnold, Fred Mayfield, Attys. for Plaintiff.

[File endorsement omitted.]

[fol. 41] In Superior Court of Fulton County

No. 60351

Mrs. Nora E. Hughes, Admx.,

vs.

Western & Atlantic Railroad

Amendment to Motion for New Trial—Filed Dec. 18, 1926

Now comes the defendant in the above stated cause and, with leave of the court and within the time allowed by order of the court heretofore made, amends its motion for new trial by adding thereto the following grounds:

1. Because the court erred in overruling the objections of counsel for defendant to the following question to plaintiff by her counsel, said objections having been made when the question was asked:

"Now, I wish you would make an estimate of what his services around the house, in the yard with reference to the chickens, the garden, and all that you have testified about—what would you say his services were worth?"

The previous testimony of the witness, referred to in said question, was as follows:

"He was all the time helping around the house; he built the chicken house and he was working in the garden. We had chickens, about 60 hens. My husband fed the chickens and looked after them when he was here and built chicken houses for them and fixed for them. And he would made a garden during the summer, which helped out in the way

of vegetables; he raised all our vegetables. He kept the place repaired, kept up the house and done all the repairs, and built fences around for the chickens. He didn't have any carpenter work done around the place, he done it himself. He helped around the house when I was sick and out of fix, he would stay off with me and he would do the cook-[fol. 42] ing and see after the boy, milk the cows and do the churning and all of that. He would look after the boy and help him with his lessons at night and try to get him educated. The boy was in the fourth grade then."

The said objections of counsel for defendant were that there had not been sufficient data furnished on which to base an estimate; further, that the question called for a mere matter of opinion; and further, that damages of the character enquired about were not recoverable under the Federal Employer's Liability Act on which the case was proceeding.

Movant contends that the court erred in overruling the objections, because what the witness had previously testified was not such a statement of facts as would warrant the expression of the opinion asked for. Further, because, if there had been sufficient data given, it was the province of the jury, and not of the witness by the expression of her opinion, to estimate the value of the services; the matter was not one for opinion evidence by the witness. Further, because under the Federal Employer's Liability Act the recovery of damages is limited to the pecuniary value of what would, with reasonable probability, have been the contributions which decedent would have made to his wife and child during his reasonable expectancy of life, had he not been killed, and the question was not limited to such pecuniary value, but covered matters not within the range of such reasonably probable future contributions; as, for instance, chicken houses already built, fences already built, carpenter work already done, milking the cows and doing the churning and "all of that," "looking after" a boy, who was nine years old and who would be a boy for only a few years longer.

2. Because the court erred in overruling the objections [fol. 43] of counsel for defendant to the following question

to plaintiff by her counsel and her answer thereto, said objections having been made at the time the question was asked and the answer given:

"Q. What would you say the value of his services was—for these services you have detailed?

"A. Well, if I had to hire a man to do what he kept up, it would amount to a whole lot a month. I would say around $30.00 a month."

The said objections were:

The pleadings do not call for it and do not cover such damages. In the next place, the evidence is not sufficient on which to base an estimate, and in the third place, damages of this character are not allowable under the Federal Employer's Liability Act.

Movant contends that it was error to overrule said objections and admit said testimony. At the time of said ruling the plaintiff had not amended her pleadings, as was afterwards done, so as to specifically seek recovery on account of domestic services of the decedent and, in which amendment, it was stated that said services were worth "$30.00 per month and upward." Said amendment was orally proposed by pl'ff's counsel and the court allowed the testimony subject to the amendment, which was promptly thereafter done.

Movant contends further that the evidence theretofore given, and which is set out in the ground of this motion last above, was not sufficient on which to base the estimate, for the reasons set out in said ground.

And movant contends further, that the limitation of damages, allowable under the Federal Employer's Liability Act, to actual reasonably probable pecuniary loss, subsequent to the homicide and within the reasonably probable expectancy of life of decedent, had he not been killed, ex- [fol. 44] cludes such indefinite and uncertain elements as were in the estimate sought and given in said question and answer.

3. Because the court erred in overruling the objection of counsel for defendant to the following question of plaintiff's counsel to the witness, J. B. Bates:

"What does an engineer make—an average engineer on that road?"

The objection thereto, made by counsel for defendant, when said question was asked, was:

"We object to that as not illustrative of any question in this case."

Movant contends that it was error to overrule said objection, evidence as to the wages of an engineer—an average engineer on that road, being immaterial and irrelevant, not illustrative of any question in the case.

Movant contends that there was no evidence as to any contract between decedent and defendant for decedent's promotion to the position of engineer, nor was there any evidence that decedent as matter of right was entitled to promotion, nor that he even had such seniority over other travelling firemen or regular firemen as to make certain such promotion.

Movant contends that said question could have been for the purpose only of seeking to make it the basis for a claim of damages on the theory that prospects of decedent for promotion to a higher position than that he was occupying, in the railroad service, should be considered in determining the amount of damages to be allowed for his death.

The witness answered said question:

"The average pay of an engineer on that road, I suppose, is $240.00 or $250.00—along there."

4. Because of the following:

H. G. Ritchey, Road Supervisor, of defendant, being on the witness stand, was asked the following questions by [fol. 45] counsel for plaintiff and made the following answers:

"Q. Are those guard rails that you were going to put in on that track guard rails?

A. No sir, that was a rail that was to have been put inside of the main track there.

Q. Did you put it in?

A. Yes, sir, it was put in afterwards.

Q. This picture No. 9 shows when you put it in, doesn't it?

A. That shows it in—yes, sir.
Q. When was that guard rail put in there?
A. I do not recall just the date.
Q. It was after the accident, wasn't it?
A. Yes, sir, it was after that occurred."

The picture referred to was a photograph of the bridge where decedent was killed.

Counsel for defendant, at the time of the above questions and answers, objected thereto as follows:

"He is asking the witness about a picture made some two or three years after Hughes was killed, and with regards to some rails lying there within the bridge structure, and as to when they were put in, etc. I object to that evidence as immaterial and irrelevant."

The objection was overruled by the court, which ruling movant contends was erroneous because said testimony was immaterial and irrelevant.

Thereafter, but on the day after said evidence had been admitted, counsel for plaintiff moved to withdraw the evidence, which the court allowed and the court instructed the jury to eliminate said evidence of said witness entirely from their consideration in the case. There was no objection by defendant to plaintiff's withdrawal of the testimony and said withdrawal was before the evidence was concluded. [fol. 46] Movant contends that this action of counsel for plaintiff and said instruction by the court to the jury, did not cure the error committed in admitting said testimony; that the said evidence had been in the case and within the consideration of the jury for many hours before it was withdrawn; that it was obviously meant to influence the mind of the jury, and to impress upon the jury the idea or belief that additional provision had been made by defendant, at said bridge, after the death of decedent, against accidents there; and, movant contends, it was of a character likely to harm the cause of defendant and to create an impression on the mind of the jury which impression was not removed by such subsequent withdrawal.

5. Because the court erred in overruling the motion made by counsel for defendant at the close of the evidence in the case, to direct a verdict in favor of the defendant.

Said motion was made upon the ground that the evidence would not warrant a verdict for plaintiff, under the Federal Employers' Liability Act; that the evidence was not sufficient to show that the proximate cause of the death of decedent was negligence of defendant; and that the evidence indicated that said death was caused by decedent being knocked from the engine by a permanent structure of the master, while decedent was attempting, on the outside of a rapidly moving engine approaching said structure, to get into the cab of the engine, with his back to the said permanent structure and of the dangerous proximity of which to an engine moving through the same he was familiar or in the exercise of ordinary care should have known of the same; that decedent had for years been accustomed, in the service of defendant, to pass through said structure, and assumed the risk of being struck while passing into or [fol. 47] through it on the outside of an engine, no wider than those on which he had been accustomed to pass through said structure; and had been specially warned not to ride on the outside of the engine while it was in motion; that the evidence showed no emergency of the service requiring him to be in the said dangerous position or justifying such absorption in his work as to excuse his forgetfulness of the danger; that the burden was on plaintiff to show that the proximate cause of the homicide was the negligence of the defendant, by a preponderance of the evidence; that there was no such preponderance in favor of plaintiff; that the preponderance of the evidence was that decedent was killed because of the position in which he had voluntarily placed himself, on the outside of a rapidly moving engine, with his back to the overhead structure of a bridge which the engine was approaching; and that there was not even any evidence that there was any unusual or more than customary rocking or swaying of the engine in approaching the bridge, but on the contrary the only evidence as to the motion of said engine was that it approached and passed through said bridge without any unusual or excessive rocking or swaying, or more rocking or swaying than was customary or usual with such an engine passing over a railroad track in good condition.

6. Because the court erred in overruling the objection of defendant's counsel to the admission in evidence on behalf

of plaintiff of photographs, marked Exhibits "1 B. B. B.," "7 B. B. B.," "8 B. B. B.," "9 B. B. B.," "11 B. B. B.," "12 B. B. B.," and "13 B. B. B."

The said objection, made by counsel for defendant at the time the photographs were offered, was because said photographs were taken from two to two and a half years after the homicide of decedent and did not represent conditions likely to be permanent conditions.

[fol. 48] The court overruled the objection and admitted the photographs, but stated that he was very much in doubt about it and would instruct the jury in his charge as to the purpose of this testimony, as he understood it.

And, thereafter in his charge, the court did instruct the jury as follows:

"With reference to certain photographs which have been admitted, the court instructs you that such evidence has been admitted by the court for the sole and only purpose of illustrating to you, if they do, the conditions existing at the time and place of the alleged accident, and you will not give effect to such evidence for any other purpose. The conditions existing before or after the accident are not material to this case. The real question would be the conditions existing at the place and on the date of the alleged injury. So you will determine from all the evidence, oral and documentary, what the conditions were at that time and place and whether or not the defendant or plaintiff were negligent as charged relative thereto."

Movant contends that it was error to admit said pictures in evidence and that the error was not cured by the instructions given by the court to the jury.

Photograph "1 B. B. B." was taken on June 9th, 1925, more than two years after the homicide of Hughes, which occurred in April, 1923, and the remainder of said photographs were taken in October, 1925, two years and a half after said homicide.

They purported to represent the condition of the defendant's track at and near the road crossing, a few feet north of the bridge where Hughes was killed, between which crossing and the bridge plaintiff alleged low places, not properly ballasted or supported, low joints, had been negli-

gently allowed to remain in the track, causing the engine on [fol. 49] which Hughes was to rock unduly, severely and dangerously.

Movant contends that said pictures having been taken more than two years after the homicide and being pictures introduced and received in evidence as illustrating the condition of a dirt road crossing and railroad track as it existed more than two years before the pictures were taken, were not properly receivable in evidence as illustrating such condition.

Movant contends that the condition sought to be illustrated was of things not permanent in character but changing even from day to day, subjected to heat, cold, rain, freeze and thaw through from twenty-four to thirty months, to the passage of thousands of railroad trains, to the changes of road depreciation and of railroad work and maintenance during all that period.

As illustrating the contention of movant it shows that Mr-. Hughes testified that on Saturday after her husband was killed on Wednesday she was at the scene of the homicide and between said dirt road crossing and said bridge observed an engine passing which hit a low place close to the crossing making the track go down 4 or 5 inches and starting the engine to rocking and then the engine passed over another low place, nearer the bridge and on the other side, causing it to go down again, knocking water and mud from under the track, and the ballast was all gone from this low place, all washed down—giving a rocking motion to the engine as it approached the bridge, so that the engine came to from 6 to 8 inches of the side pieces of the bridge. Before the pictures were offered Mrs. Hughes testified that picture No. 7 represented the situation just as she saw it that day, that picture No. 13 represented the situation substantially as she saw it that day; that picture No. 10 "looks like the situation as I saw it;" that picture No. 1, was "a good picture of the bridge as I saw it;" that picture No. 9 "substantially represents the situation as I saw it;" that [fol. 50] picture No. 11 "represents the situation as I saw it;" that as to the dirt under the cross ties, as to the ballast of the track and as to the condition of the surfacing of the track, "it was in the same condition when these pictures were taken as it was when I was there" "as to the same

ballast, the same dirt, the same condition of the ties, the same alignment of the track, I don't know that it was just the same ballast and all like that or not, but the track is bad;" "bearing in mind that there was a little road that came down there from up on the hill and that for a year and a half or two years the rains and storms and freezes have come and poured down from that hill on to this place, I will say that it looked to me about the same."

W. G. Kemp, fireman on the engine from which Hughes was thrown and killed, a witness for plaintiff, testified:

"The condition of that track as you approach the bridge say for a hundred yards on the other side coming this way seemed to be all right; I didn't see anything the matter with it." "I didn't notice any rocking of that engine at that place any more than usual; it was running all right." Also that on Saturday following the homicide of Hughes on Wednesday, he came back over the road and it was in the same condition as on the previous Wednesday.

Adams, witness for the plaintiff, who took said pictures, testified that when those were taken in October "there were evidences over the road there of weeks of rain"; and that "I put my camera where I was told to put it."

The above evidence was all introduced before the said photographs were offered and put in evidence.

7. Because the court erred in charging the jury as follows:

[fol. 51] "If the plaintiff in this case has not proved, by a preponderance of the evidence, that the defendant was negligent in some one or more of the particulars described in the petition, then there can be no recovery of damages in this case. You are instructed, however, that if the defendant was negligent in some one or more of the particulars described in the petition in reference to the condition of the defendant's track, road bed and right of way, and if such negligence in part was the cause of the death of the decedent, then, in such event, if you find that the decedent was guilty of negligence, and such negligence of the decedent would not entirely defeat a recovery, but would only diminish or reduce the damages which would be awarded to plaintiff. In such case of negligence on the part of the

decedent, Mr. Hughes, the damages would be diminished by the jury in proportion to the amount of negligence attributable to Mr. Hughes."

Movant contends that said charge was erroneous in the following particulars:

(1) Because the portion of the charge in the following words:

"that if the defendant was negligent in some one or more of the particulars described in the petition in reference to the condition of the defendant's track, road bed and right of way, and if such negligence in part was the cause of the death of the decedent, then, in such event, if you find that the decedent was guilty of negligence, such negligence of the decedent would not entirely defeat a recovery,"

did not give effect to the defendant's contention of assumed risk on the part of the decedent. In other words, whether or not the defendant was negligent in the particulars mentioned, and whether or not such negligence in part may have been the cause of the death of the decedent, if, as de-[fol. 52] fendant contended he did, the decedent assumed the risk of such conditions, or subjected himself to the perilous position in which he voluntarily placed himself to risk from such conditions, in violation of defendant's instructions to him, and without the existence of an emergency causing him to place himself in such position, plaintiff could not recover but recovery would be entirely defeated, since the alleged negligent condition of the track was merely a condition, but the proximate cause of the death was the negligence of decedent himself with reference to conditions, the risk of which he assumed.

(2) Movant contends that it was error to charge the jury:

"In such case of negligence on the part of the decedent, Mr. Hughes, the damages would be diminished by the jury in proportion to the amount of negligence attributable to the employee, Mr. Hughes."

Movant contends that this charge was error, because, under the construction given by the Supreme Court of the

United States to the Federal Employer's Liability Act, the rule for the measurement of damages in cases where contributory negligence of the decedent is permitted to be set up, in case of such contributory negligence being found by the jury to have existed, the plaintiff would not be entitled to recover full damages, but only such a proportionate amount, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both the defendant and the deceased; the movant contends that neither in said charge quoted, nor anywhere in the charge of the court, did the court present to the jury the rule as to proportion between the amount which might be found in case of such contribu- [fol. 53] tory negligence attributable to the defendant bore to the entire negligence attributable to both the defendant and the deceased.

8. Because the court erred in refusing to give in charge to the jury the following request to charge, made in writing by defendant's counsel before the beginning of the charge of the court to the jury in said cause:

"Mere contributory negligence on the part of a servant will not entirely defeat a recovery, under the provisions of the Employer's Liability Act of Congress, but if you should find that there was negligence causing the death of Ira L. Hughes which was partly attributable to him and partly attributable to the defendant railroad company, and that he was not killed because of exposure by himself to a risk assumed by him, the plaintiff would not be entitled to recover full damages, but only a proportionate amount, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both."

Movant contends that the said request to charge should have been given in charge by the court to the jury, the same containing a correct statement of law adjusted to an issue in the cause. Movant further contends that the refusal to give said request in charge was erroneous, because of the failure on the part of the court to give any where in his charge to the jury in said cause, the rule or proportion of the amount recoverable in case of contributory negligence

to the full amount as the negligence attributable to the defendant bears to the entire negligence of the defendant and the deceased.

9. Because the court erred in charging the jury as follows:

[fol. 54] "You are instructed that under the Act of Congress it was the duty of the defendant to exercise ordinary care to keep its track and road bed in proper condition, and that if, because of any defect or insufficiency due to the defendant's negligence in its tracks or road bed, any employee is killed, that then the personal representative of such employee may maintain an action and recover such damages as, under the law, might be assessed under instructions to be hereafter given you."

Movant contends that said charge was error because the Act of Congress referred to does not undertake to prescribe the extent of the care which must be exercised by the railroad company as to its track and road bed.

Movant contends that said charge was error further, because of the use of the words "in proper condition," the said words being too vague and indefinite, and, as movant contends, the duty of defendant is to exercise ordinary care to keep its track and road bed, so far as employees are concerned, in as reasonably a safe place for such work as the servant is called upon by his duty as such servant to do, under such conditions as the railroad company should have reasonably anticipated would exist in the method of the employee in discharging his duties as its servant.

10. Because the court erred in charging the jury as follows:

"In considering the law as to the pecuniary benefits to the wife and child the jury may also consider, in the case of the child, the loss of such training and education as it would, under the evidence, have reasonably received from the parent, and which could only be supplied by the services of another for compensation, and in such case the jury would fix the money value, if any, of the loss of such care, training and education as the deceased would have bestowed upon the child, had he lived."

[fol. 55] Movant contends that said charge was error because it was without evidence sufficient to sustain it. Movant contends further, that said charge was error, because the evidence as to what the decedent did for the child in the way of training and education was too vague, uncertain and indefinite to be made the basis of a pecuniary allowance; and that the evidence was not sufficient to show a monetary value thereof or what compensation would have been reasonably necessary to supply such services from another.

11. Because, after the court had instructed the jury,

"That the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowance according to the circumstances for the earning power of money, is the proper measure of damages in an action of this character,"

he failed in connection therewith, or any where in his charge to the jury, to instruct the jury that the beneficiaries would be chargeable by way of discount in making such reduction with such an amount as the use of ordinary care in the investment or use of the amount to be awarded by the jury would reasonably result in obtaining; and because the court having charged as is herein quoted, thereafter charged the jury as follows:

"You are authorized to make the calculations reducing these sums found by you, if any, to their present value by any proper mathematical calculation. In other words, whatever the annual loss of these beneficiaries might be throughout the expectancy of the decedent, or throughout such part of his expectancy as you decide that these beneficiaries should receive the benefits—the sum would be reduced to its present cash value upon the rate of interest which you fix as reasonable, just and right under all of the [fol. 56] circumstances."

Movant contends that this last quoted charge was erroneous because it allowed too wide and indefinite a basis to the jury in determining the rate of interest or discount to be used in reduction to present cash value.

Movant contends further that the proper rule for such rate of interest or discount is the guidance afforded by the earning power of money invested with ordinary care.

Wherefore movant prays that the grounds of its original and amended motion being considered the said verdict be set aside and a new trial be granted.

Tye, Peeples and Tye, Attys. for W. & A. R. R.

The foregoing amendment allowed and ordered filed; the recital of facts contained therein are hereby approved as true and correct. This 18th day of December, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

Due and legal service above amended motion for new trial acknowledged. Copy received. This Dec. 18, 1926.

Reuben R. & Lowry Arnold, Attys. for Pl'ff.

[File endorsement omitted.]

[fol. 57] In Superior Court of Fulton County

Order Overruling Motion for New Trial

The original and amended motion for new trial in the within stated case coming on to be heard. It is after argument heard, ordered that said original and amended motion be and they are overruled and a new trial is denied. This Dec. 18th, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

Petition and Order for Additional Record

Western & Atlantic Railroad

vs.

Nora E. Hughes, Admrx. of Ira Hughes, Deceased

Bill of exceptions carrying case to Supreme Court from judgment refusing new trial on the 18th day of December, 1926. Bill of exceptions certified Jan'y 12, 1927, and served Jan. 18, 1927

In the case above stated, the defendant, Nora E. Hughes, Administratrix of the Estate of Ira L. Hughes, hereby pe-

titions the judge to order sent up, as a part of the record in said case, the opinion of Judge W. D. Ellis, which is part of the record of said case, and which was rendered upon the grant of a new trial by him on June 21st, 1926, the said defendant in error desiring said part of the record sent up, and the same having been omitted from the original bill of exceptions.

Reuben R. & Lowry Arnold, Attys. for Nora E. Hughes, Admx. of Ira L. Hughes, Deceased, Defendant in Error.

[fol. 58] Upon the foregoing petition, the court hereby orders the opinion of Judge Ellis, rendered on granting the new trial on June 21st, 1926, sent up as part of the record in said case and properly certified by the clerk. This 18th day of January, 1927.

Edgar E. Pomeroy, Judge S. C. A. C.

In Superior Court of Fulton County

No. 60351

Mrs. Nora E. Hughes, Administratrix,

vs.

Western & Atlantic Railroad

Opinion—June 21, 1926

This case came on several months ago for hearing on the motion for a new trial, a verdict for the plaintiff for the sum of $17,500.00 having previously been returned by a jury impanelled to try the case.

At the outset, I want to say that I very greatly regret the delay incident to passing on this motion, but it was providential, and therefore, of course, could not be avoided.

The case was brought by the plaintiff to recover damages for the homicide of her husband and it was brought under the Federal Statute, and there was no question made but that the plaintiff's husband and the defendant were, at the time, engaged in Interstate Commerce.

The case was hotly and vigorously contested and the trial of it occupied five consecutive days. A great number of witnesses were examined and the record is full of the testimony of witnesses, brought both by the plaintiff and the defendant, and an inspection of the record will show that much of the testimony is exceedingly conflicting.

[fol. 59] When the motion for new trial came on the contest was renewed with all the force and vigor of able counsel and it actually occupied three full days in the hearing of this motion.

At the time this hearing occurred I had a number of cases on hand which needed immediate attention and this one was postponed only for the purpose of giving time to thoroughly go over it, to study the points made in the amended motion for a new trial and to re-read some of the authorities which had been read on the hearing, but my sickness prevented that.

After carefully considering the case and going over it again; I am still in doubt as to some of the law involved in it and charged by me, and I am very greatly in doubt as to some of the propositions contended for by each side as being established by the evidence.

Without going into elaborate details, I would like to state that there are some things in the case that seem to be clearly established. Indeed, some of the things involved in this case are conceded: That Mr. Hughes, the husband of the plaintiff, was a man in fine health, and good capacity and of considerable earning power and that he devoted himself and his earnings to his family, and in his death his wife and child sustained a great loss.

I believe, under the evidence, that bridge which carried the defendant's track and with which the decedent came in contact and was killed, was a substantial structure; that it has been there for many years; that Mr. Hughes had passed through it many times, and that he knew its position and character and knew it when he became traveling fireman.

Therefore, I am of the opinion that as to the bridge it was an assumed risk, but that the railroad track was out of order and caused that locomotive to sway in running [fol. 60] over the track as witnesses testified when going

under the bridge over said track was not an assum[illegible]; and while there was a conflict in the evidence there was ample evidence to justify the conclusion that the track was out of order and that that contributed to the injury, and that if this situation had not existed Hughes might have passed safely under the bridge even though he was in a perilous position.

It appears to me perfectly plain that this freight train was approaching that bridge at a rapid speed and this his riding on that running board was placing himself in a dangerous position.

My opinion is there will always be a finding for the plaintiff of some amount in this case. I am not deciding whether there ought to be or ought not to be, but what has greatly disturbed me is, whether the amount of this verdict can be justified, under the circumstances, considering the doctrine of contributory negligence.

The evidence in this case, to my mind, establishes the fact that there was a rule by the defendant company prohibiting firemen from walking on the running boards of locomotives while in motion. It does not appear that this rule was kept in constant view and there is some evidence of neglect in enforcing it; but that there was such a rule, and that it was known to Mr. Hughes seems to me to be manifest from a fair interpretation of the evidence, and particularly in view of the positive statement of the Master Mechanic, a very intelligent witness, that he personally told Mr. Hughes of the existence of this rule and warned him as to its observance, and that there was no emergency requiring Mr. Hughes to ride on the running board. In doing so he was neglectful. Men get accustomed [fol. 61] to danger and Mr. Hughes may have forgotten his peril, but he could not forget at the expense of the defendant.

His contribution to this fatal injury was great and to some extent impeaches the amount of the verdict.

Under the decisions of our courts, great responsibility is thrown on the trial judge in respect to whether he is satisfied or not satisfied with the amounts rendered in verdicts, and yet the law is, while this particular feature is thrown on the conscience of the judge, he has no discretion in the matter except to grant or refuse a new trial.

In other words, if he is satisfied with all the trial of the case except as to the amount of the verdict, he has no right, under the law, to write off part of it and let the other part stand.

It is impossible to compensate in money the loss to a good woman and child of the husband and father, and yet there must be come limit to these things, and if Mr. Hughes had not been decidedly negligent in the case; if he had never heard of the rule against going out on the locomotive when in rapid motion, if he had been in the exercise of ordinary care in passing along the road and through this bridge, well known to him, and if he had been killed, then, as far as compensation could go, $17,500.00 would have been considered a fair verdict in the case.

But, under all the circumstances I have considered, and with a desire not to interfere with the province of the jury on the question of amount of damages unless it was considered within the line of bias and prejudice, this case, as it stands, leaves my mind in a state of uncertainty and unrest, and my conclusion is that the best way out of it, the fairest way, is to grant a new trial, and let another [fol. 62] jury pass on the facts and let the judge on another occasion deal with these questions of law perhaps more explicitly and clearly than I have done in this case.

An examination of the charge will show that there is a great deal in it. Taking it as a whole, I do not believe that there has been any well defined error, but there are portions of it, taken separately, that seem to be contrary to the law that is contended for by defendant's counsel, and backed up with authority.

It is therefore ordered that the motion for a new trial is granted and the verdict is set aside and new trial ordered. This June 21st, 1926.

W. D. Ellis, Judge S. C. A. C.

[fol. 63] IN SUPERIOR COURT OF FULTON COUNTY

Statement of Evidence—Filed December 18, 1926

BRIEF OF EVIDENCE

Mrs. NORA E. HUGHES, plaintiff, sworn, testified:

I am the wife of Mr. Ira F. Hughes, the plaintiff in this case, and the administratrix of the estate of my husband. At the time of his death my husband left one little boy, nine years old. My hu*ndred* died on the 23rd day of April, 1923. He was a traveling fireman on the N. C. & St. L., that is the Western & Atlantic Railroad. He had been traveling fireman about 23 days. Before he was traveling fireman he was a regular fireman on this same railroad, running from here to Chattanooga. He had been a regular fireman about 12 or 13 years. He was 34 years old at the time of his death. He had been married 10 years, 10 months and 25 days at the time of his death. As fireman he was earning $150.00 to $175.00 a month, and as traveling fireman he earned around $200.00 a month. He had drawn his wages for half a month; they pay every two weeks on that road. For the two weeks as traveling fireman he made $91.49. We married in 1912. At that time he was working as fireman on the road. He weighed 240 pounds and he was 6 feet 3 inches. He was a tall, slim kind of a man, but a well made, muscular man. My husband spent on himself, taking into consideration his clothing, hats, shoes, underwear, and any expenses incurred while out on the road for lunches, rooms up in Tennessee, and anything of that sort, about $320.00 a year. That included any personal habits that he had, such as smoking, chewing, etc. He smoked, but he chewed very little. He didn't drink any at all. He would get his check cashed and then turn it over to me, what he drew each month. The grocery bill was about $45.00 a month; the meat bill $6.00 or $8.00 a month. We kept two cows and I sold milk and butter. I tried to pay most of the time cash for the feed from what I sold of milk [fol. 64] and butter; I paid for the feed mostly out of my sales of milk and butter; then we would still have milk and butter for the table. The house we lived in I was buying on the installment plan, $20.00 a month. I would say that

the clothing for myself and the boy, drug bills, doctors' bills, etc., would amount to around $40.00 a month. My health has been bad, I haven't had no health since I was 18 years old. I had to have medicine all the time. In addition to contributing that, my husband performed labor around the place; he was all the time helping around the house; he built the chicken house and he was working in the garden. We had chickens, about 60 hens. My husband fed the chickens and looked after them when he was there, and built chicken houses for them and fixed for them. We had a pretty good sized lot; the front was 110 feet, running back 152½, and we had a run for the chickens; and he would make a garden during the summer, which helped out in the way of vegetables; he raised all our vegetables. He kept the place repaired, kept up the house and done all the repairs, and built fences around for the chickens. He didn't have any carpenter work done around the place, he done it himself. He helped around the house when I was sick and out of fix. He didn't want to leave me when I would be sick but he would stay off with me and he would do the cooking and see after the boy, milk the cows and do the churning and all of that. He would look after the boy and help him with his lessons at night and try to get him educated. The boy was in the fourth grade then. If I had had to have hired somebody to do what he done around there, it would have amounted to a whole lot; I would say around $30.00 a month. My husband was killed on Wednesday, April 25th. I went [fol. 65] up to the place of the tragedy on Saturday after he was killed on Wednesday. I went there with my brother, John Hedrick, and my sister-in-law and my father and mother. We went up in the afternoon. There were trains passing along while we were there. It was clear. It has been raining some, like the spring time, you know, spring rain. There was a dirt crossing there just before you got to that bridge on which my husband was killed. That is in Tennessee. That is Chickamauga Creek, bridge 123. I would say that grade crossing was 30 or 40 feet from the north entrance to that bridge. I observed an engine as it passed there. I observed that when it hit that low place on the right hand side coming towards Atlanta it went down, give way. I didn't measure how close that first low place was

to the crossing on the right hand side coming to Atlanta, but it was pretty close to the dirt crossing. I observed the effect that the engine had as it went over that crossing at that place; it gave down; I saw that. The track gave down at that point 4 or 5 inches. The effect it had on the locomotive of that train was that it started it to rocking. I had not observed it rocking before that. I observed another low place just before you get to the bridge on the left hand side coming to Atlanta, and I observed the train at it hit it and observed it knocking the water and mud from under the track; it knocked the mud out and the ballast was all gone from this low place, all washed down, you know, under the ties. The ballast was worn out and it knocked the mud and water from under that place. After the engine, in approaching that bridge, struck these low places in the track it had a rocking motion; I could see it rock. That bridge has upright pieces and it looked to me like the engine, [fol. 66] in its rocking motion, came awfully close to the side pieces of that bridge; I would say about 6 or 8 inches; that would be my judgment. Coming down to this track (indicating on picture) there is a dirt road. That comes off of that hill. There is a house on that hill. I could see signs of the water washing and running down from that hill to the track. The sand and dirt would wash right off down across the railroad and it washed all the ballast from under the ties. This other picture that you show me I recognize; that is right close to the dirt crossing, looking from the east side—no, that is from the west side, the side the house is on. Now, this picture No. 8 that is shown me, that looks into the bridge. The dirt comes down off the hill across the railroad. That looks towards Atlanta and takes in the crossing and the mouth of the bridge. Right across the first low place after you get across this dirt crossing, that is on the right hand side as you come towards Atlanta, and just before the engine got to the bridge there is another low place on the left side. This picture No. 7 shows the dirt crossing that comes down across the railroad, and the road that comes down close to that house and a low place in the track right after you cross the dirt crossing going towards the bridge. That photograph represents the situation just as I saw it on Saturday of the week my hus-

band was killed. This picture No. 13 is the low place just before the engine gets to the bridge. That represents the situation substantially as I saw it that week. This picture No. 2 shows the bridge where it was knocked down in the water. That represents the bridge as I saw it that day. Picture No. 10 is looking towards Atlanta. I could hardly say how far up the track north of the bridge that was taken from, but about 100 feet. That looks like the situation [fol. 67] as I saw it. Picture No. 1 represents the dirt cross that comes across just above the bridge. That is a good picture of the bridge as I saw it. This picture No. 9 is looking north from the bridge. That substantially represents the situation as I saw it. This picture No. 11 shows where this dirt road comes across the railroad crossing from off the hill; that represents the situation as I saw it. This picture, now, marked 100, shows where they were working on the bridge after Mr. Hughes was killed, fixing to put down some more rails. That shows the north end of the bridge and the track, and that represents it as I saw it the day that I went up there. That shows the track and everything else as it was that Saturday, but these rails and things lying in front of the bridge were not there.

Cross-examination:

Yes, my health was bad at the time Mr. Hughes was killed, and had been for some time, and has been since. Mr. Hughes spent a considerable part of his time nursing me and helping to nurse me, and doing those things which, if my health had been good, I would have done myself. Yes, it is true that during the time that he was doing those things he was, of course, not out on the road earning wages. Yes, Mr. Hughes would have his pay check cashed and turn the bills over to me. I know they were derived from his pay check because he would always show it to me; he would show me his money he drew, and he would lots of time-bring his check home and show it to me. that he got on the road; he would just get his check and bring it home when he got off. No, not every time; I didn't keep any account of the times, you know, that he would show me his pay check. I couldn't answer whether Mr. Hughes at any time during the two years before his death put in full

time for any one month before he became traveling fire-
[fol. 68] man, because I don't know; I couldn't tell whether he put in every trip or not. Yes, my husband spent about $90.00 a year on his outer clothes. I made his summer underwear myself and most all of his shirts, because he had such a long reach he couldn't hardly get his sleeves long enough and he always wanted me to make his shirts. I figured his underclothes at about $14.00 a year, and his shoes at about $12.00; four pairs a year. In the estimate I made I have not counted in the repairs on his shoes. I will say it cost Mr. Hughes, to eat at home, about $10.00 a month. He was a young strong healthy man, but he didn't eat so much, he was not a free eater. When he was on a preferred run he would go out one afternoon and would be gone that night and then the next night he would come in somewhere around midnight, and the next time he would go out he would go at midnight and come in the next day about 12; he was away about half of his time. He would give me his pay check money and ask me to give him so much a trip, and that is the reason I know about how much he spent. I remember pretty close to what I would give him on each trip. I would give what he would ask for, $3.00 or $4.00 a trip he would ask, maybe for a dollar or two a trip; he wouldn't spend that much money every time he was away, though. He smoked but he didn't chew much. He smoked about like men do; he was not a heavy smoker. I guess he would spend about $24.00 a year for tobacco; that is just what I would think about it. He gave some to charity, I guess, but I hate to say he give so much. When he would go to church and they would take the collection he would give something, but of course I never knew just what he put in. As to drug bills, he was not sick any; he was very strong and healthy. When he was on a preferred run he was at home about half of the time, and away about
[fol. 69] half of the time. What I mean by a preferred run is, leaving out one day and back the following night. He was on a preferred run quite a while, I don't remember just how long. Yes, for several years before his death he was gone about half of his time away from home when he was at work; he was on the road about half of the time. Yes, sir, I testified before that for several years before his death he was gone about half of the time away from home, and

when he was away he was not under my observation. I don't remember the dates when those pictures that were shown me were taken, but they were taken after he was killed. I was present when some of them were made. I was there a lot of times but there wasn't no pictures made every time; I was present just one time when pictures were taken. I was there when this picture No. 100 was taken. I was not there when the rest of them were made. Yes, sir, my husband was killed on Wednesday, the 23rd day of April, 1923. No, sir, I don't think this picture No. 100 was taken more than two years after my husband was killed; I don't think I am mistaken about that. It was made about a year and a half, according to that date on there. The first time I went up there after my husband's death, I went from my mother's. She lived two or three miles away from this place, I don't know the distance. My husband was buried in the cemetery at Ringgold, I don't know how many miles that is from my mother's, but it is a good many. No, when I went up there two or three days after my husband's death, it had not been raining heavily—not more than usual —spring rains. Sometimes they are light and sometimes they are heavy. The morning following this it just came a shower of rain. On the afternoon my husband was buried it came a pretty heavy rain, but no cloudburst or anything. It was not any heavier than we usually have, Mr. Peeples. [fol. 70] It was not a heavy rain, not more than usual. My husband was buried on Friday and the next day I and my brother, and my father and mother, and my brother's wife went up to the place. As to my having testified on the former trial: "There had been very heavy rains the night before we went there and the afternoon before. It rained that day and had been raining all along that spring. I remember it was a wet spring and rained all April. There came a very heavy rain that evening we were at the funeral while we were burying him; it was a very heavy rain that afternoon; a very heavy rain, making the effect on the dirt that makes mud." I guess I testified that if it is down there. It rained the evening we buried my husband but we didn't go to the bridge until Saturday afternoon, but it hadn't rained that morning. I just got all balled up if I said it, because I remember well. As to my having testified on the former trial: "There had been a very heavy

rain the night before we went there." We didn't have any heavy rain, any heavier than we usually have now, not any heavier than we usually have all the time. If I said that I just had it all balled up. Yes, I said that I testified that on the other trial. As to its being true or not that we had had a very heavy rain the night before we went there and heavy rain the afternoon my husband was buried—we had no heavier — than usual the afternoon that we buried Mr. Hughes, and it had not rained the day we went up there, because it was clear. It was April that we were up there. As to my having testified on the former trial: "I remember it was a wet spring and rained all of April"—it didn't rain all of April and I don't remember testifying that; it surely didn't rain all of April because we couldn't have gone up there. When I took my stand to see that train go through the bridge I was on the Chattanooga side, stand-[fol. 71] ing pretty close to the track and pretty close to the bridge, but I don't know the distance. We were between the crossing and the bridge. I was standing close to the track between the crossing and the bridge. Yes, this engine passed me before it got into the bridge. I don't know how many cars had passed me before the engine got into the bridge because I didn't count them. I wasn't standing so close to the track but I could see the train when it hit them low places, and went into the bridge. Yes, sir, supposing that these pictures about which I have testified were take- say a year and a half or a long period of time after my husband was killed and after this time that I was there, as to the dirt under the cross ties, as to the ballast of the track and as to the condition of the surfacing of the track, it was in the same condition when these pictures were taken as it was when I was there. The track sure was in bad shape the Saturday after he was buried. The track was bad all the time. As to the same ballast, the same dirt, the same condition of the ties, the same *all* alignment of the track—I don't know that it was just the same ballast and all like that or not, but the track is bad. Yes, sir, bearing in mind that there was a little road that came down there from up on the hill and that for a year and a half or two years the trains and storms and freezes have come and poured down from that hill onto this place, I will say that it looked to me about the same. No, when I say that this

track went down under the engine 4 or 5 inches, I didn't measure that, the same way as the engine rocking when it went into the bridge and as to how near it seemed to come to the timbers of the bridge—I didn't measure it, but it came awful close to the bridge. It is my impression that it came in about six inches of the side timbers. Yes, sir, I [fol. 72] said on the other trial that I thought it was 6 or 8 inches, it looked to me something like 6 or 8 inches, that is what I testified. No, sir, I am not an expert on railroad tracks, or the proper construction of railroad tracks; I have never been in that business. Yes, sir, I know the track has to have some play where the engine passes over it, but anybody can tell when a track is in bad condition; anybody can see when the ballast and everything is washed. The ballast and everything was washed from between the cars; the ballast was washed out from between the ties.

Plaintiff introduced, also, the depositions of W. G. Kemp, as follows:

Direct examination:

At this time I am firing for the Western & Atlantic Railroad and run between Atlanta and Chattanooga on a freight train. On the 25th day of April, 1923, on the day Mr. Ira L. Hughes was killed, I was working on the same road. I was firing at that time on train No. 51, a freight train going from Chattanooga to Atlanta. I left Chattanooga in the morning. I was fireman on that engine. We had 667, a stoker firing engine. That was one of these big new stoker engines. It was some bigger than the engines we had been having. We fired it with machinery. When we left Chattanooga that day the traveling fireman of the Western & Atlantic Railroad, Ira L. Hughes, was aboard my engine. His job as traveling fireman was to instruct the fireman how to operate the s-ocker. I don't know how long Hughes had held that job as traveling fireman. That was the first one of the big new stokers I had been on. As to whether I needed any instructions how to work it: I got here all right after I didn't have any. He gave me instructions. The first part of the trip he did the firing and I watched

him. We judge of our fire by our *some*. Whenever you get a thick black smoke you are burning too much coal. That [fol. 73] is how I learned to fire, by the smoke stack. The steam chest is on the front of the engine, on each side of the engine, towards the front end of the engine. He fired from Chattanooga to Chickamauga. When we got to Chickamauga I took charge of the firing. That bridge 123.6 is 123 and six tenths miles from Atlanta. That bridge was in Tennessee. After he quit firing and turned the firing over to me the last time I seen him he was standing over by the engineer until he went out. I did not see him get out on the running board of the engine. I did not see him as he got around in front of the smokestack; I seen him when he come around on the running board, on my side. We were a right smart piece from the bridge he was killed on; he stood around on the running board there. He was looking up when I seen him, on top, watching the smoke stack or something, watching the smoke or something. He was near by the smoke stack. He was looking up; I suppose he was looking at the smoke stack. His face was turned in the direction of the smoke stack. It is one of the points in firing, to see how the smoke stack is operating, from the inside, you can see it. I don't know what he was out there for. The smoke stack is one of the points you want to watch to see whether the engine is being fired properly, you want to watch the smoke. He was closer the stack than he would be in the cab. You can see it all right in the window. He was closer to it. I don't know what he was looking at; he was looking up. I could not tell you where was he as we entered the Chickamauga Bridge. I saw him after I saw him looking at the smoke stack back near the ca*n* window. He was walking, coming back near the cab and I saw him standing there looking up. He was looking up; he was way back from the smoke stack and he was looking up at the top of the boiler. That was not looking towards the [fol. 74] smoke stack, he was looking up on top. I don't know what he was looking at; he was looking up. His face was in the direction of the top of the boiler. He was still on the running board at that time. After that I seen him when he fell off on the bridge; I didn't see it hit him. I could not see what hit him. He fell on to the cross ties, he was going down. I didn't see him when he hit; I seen him

when he was falling. I saw him when he was falling off. I don't know what he was standing on when he fell. I didn't see his feet as he fell. When I saw him falling he was just the length of the cab back of the gangway here where you go out, the space where you go out to the engine, that is where I see him falling. There is not a step that goes from the caboose on to that running board of the engine, only the grab iron up on top. The sand box is in front of the dome. Those running boards run right up to the cab. A small man can get out of the front window of the cab on to the running board. Hughes was not a small man. When I saw him the last time on the running board looking towards the top of the engine he was on my side about two feet from the cab, right near the window. Whether that was the place from which he fell I don't know. When I saw him falling he was not near that place; he was back here, where the steps go up into the cab. I saw him when he hit the bridge. Where he fell from I don't know, I know where he was when I last seen him and when he was falling. When I saw him he was already falling. After I saw him that last time of course the motion of the engine would carry him back some. I didn't see him trying to go around the cab. I didn't see him when anything hit him. It would be only guess work on my part if I tried to say what did hit him or what caused him to fall I don't know. I don't know where he fell from. [fol. 75] All I know is, the last time I saw him was about two feet ahead of the cab on the engine standing on the running board looking at the top of the boiler. Where I saw him falling was inside the bridge. There were upright pieces in the side of that birdge outside, going up, the frame. I did not go back to see his body. From that place the engine stopped I supposed about fifteen, may be eighteen cars, something like that. He stopped as quick as he could; he put it in emergency and stopped as quick as the train could stop. The traveling fireman on that trip was there to instruct me. I have had traveling firemen on my engine several times since that and before. I have seen them go out on the front of the engine; before that and since both. I don't know what they go out there for; I could not say. I have gone out on the running board to rake the sand over, when the engine was in motion; to take your sand so it will

run you have to do that occasionally, on the hills sometimes, on the hills frequently. I have been working on that road since 1913. I have seen a bulletin order put up since this accident about engine men and firemen not going out on the engine when running. I saw it before this accident occurred; I don't remember how long it has been. It was taken off the board, they taken them off after a certain length of time. After this accident I don't know whether the same bulletin was put back or not. I could not hardly say how much larger the cabs are of these big stoker engines than those I had been firing before that. They are some larger but I don't know exactly. I never been stopped on the bridge with the engine, and running I could not say, could not figure it out, how much space there was between the side of that engine and the bridge; you cannot tell how much space there was; a man could not tell in running how [fol. 76] much space there was, not exactly. I have not noticed close enough to tell. I could not say how much space there was. The condition of that track as you approach that bridge say for a hundred yard- the other side coming this way seemed to be all right; I didn't see anything the matter with it. It was in the same condition two days afterwards and in the same condition four days afterwards as it was when this accident happened, so far as I know. A low place in the track can make an engine rock much, if you are running fast it will; if you are running fast a low place will make the engine rock. A big engine don't rock any more than the little ones; they rock as much as the little ones, in a low place. A low place will make any of them rock.

Cross-examination:

How much it will rock will depend on how low the place is and how fast the engine is going. I didn't notice any rocking of that engine at that place any more than usual; it was running all right. You can see the smoke stack all right from the cab window, I always did. My engine was steaming good, I didn't make any more smoke than he did. That was my first trip on that engine; my first trip on a stoker engine, we have different engines every trip nearly. This engine is the same as the others of that class, 650's.

The same width from 650 up to 671 I think. The 600's are about the same. The- have been in use on the road a good while; they are mighty near all gone now. The- have been using the others on the road for several years. He fell on the ties. I don't mean he hit the bridge. I don't know whether he hit the bridge or not; he didn't hit the track, when I seen him roll off; that is all I know, all I mean. I didn't see him hit the bridge, I think I said that. When I [fol. 77] saw him last before that he was just outside the cab window, he was standing still. I saw him first when he came around the front of the engine and he stopped and was looking at something, looking up. He was looking towards the smoke stack. I don't know what he was looking at. Then I saw him afterwards when he was near my cab window and he was looking up then, he was just looking up at the top of the boiler; I don't know what he was looking at. There had not been anything the matter with the sand box on that trip. As to whether the upright timbers of that bridge are at a sufficient distance from an ordinary engine going through there for a man to go around on the running board and go around the cab and get in there, I don't know whether a man could get around there or not. I never tried it and have never measured it. If he had been standing, and if he had continued to stand where I saw him outside on the running board, outside my window, he would have *have* been struck; it could not strike him without striking the cab or the engine if he had stayed where he was. When I saw him falling I hollered at the engineer to stop, and he put on the brakes in emergency. When I saw him outside of my window, standing near my window, I had not at that time, entered the bridge, but was very close to it. At that time we were I suppose about fifty yards when I last saw him. When I last saw him before I saw him falling. We were going towards the bridge. These bulletin orders I spoke of being put up on the bulletin boards and staying there awhile, and then coming off, that doesn't mean they are not of force any longer, unless we are notified.

Redirect examination:

The running board I guess is about fourteen inches wide. The running board came out as far as the side of the cab. [fol. 78] If the running board goes out as far as the side of

the cab, whether his body could go out beyond the cab when he was standing on the running board is just owing to whether he started around the cab. If he didn't try to go around he could have stood on the edge of that running board and held on to those rods on the side of the boiler and leaned out beyond the line of the cab, that would have put his body or head out further than the cab; if he had leaned out there it would. Whether if the engine had rocked so as to cause his body to go out, his body could have gotten out further than the cab by the rocking of the engine. I don't think so, because he could have rocked with it. He may have if he got unbalanced. I think he told me he weighed about 220 pounds, he was a large man. When I saw him he was standing sideways to me on the running board, looking up on top. The brakeman was on the engine with me on that occasion. He was sitting on my seat. He was not in my way as to seeing the smoke stack. He was in front of me then. I could look outside the cab window, my head would be out. It would put my head outside the line of the cab. That is the only way you could see the smoke stack there by sticking your head outside the cab window, which would put it outside the line of the cab. You can see the smoke stack by looking outside the front window too. You can see it well by looking through the front window when that window is open. I don't know whether it was open or shut on that occasion. Sometimes you get cinders in your eyes if you look through the cab window. If a man is out on the running board and close to the stack, he is not as apt to get the cinders in his eyes as if he was back further, not right by the smoke stack. I could not say whether that is a better place out there, so far as safety to your eyes is concerned, as from the [fol. 79] cab or not. The cinders fall behind the stack. If you are there close to the stack, some fall on you but not bad like they are back behind. This 600 class of engines is not as heavy on the drivers as this big stoker class of engines. I could not tell you what the weight is. I did not hear any knocking in the front end of that engine on that trip. I did not know of anything wrong with it, not a thing.

Recross-examination:

That cab has a side window and front window on the engineer's side and a side window and front window on your

side. A man who wanted to look at the smoke stack could look through the window on the engineer's side or through the window on my side; either through the front window or the side window. It would just depend on your position as to whether you could see the smoke stack as well from one place as the other. There was no extra quantity of smoke coming out of the smoke stack to indicate trouble with the fire. I did not see anything to indicate any trouble with the firing on that engine. I have known Mr. Hughes about eight years. He had been the fireman on that road for some time, before he became traveling fireman, running between Atlanta and Chattanooga, passing through this same bridge.

Redirect examination:

I don't know the distance of the timbers from the cab; I have never stopped in there. I don't know nothing about what he knew. I knew it was not safe for a man to go around that cab when passing through that bridge, that was apparent to any ordinary observer. Any man with ordinary eye sight could see it was not safe to go around that cab, in that bridge, with the timbers so close. I never saw [fol. 80] him try to go around the cab. I don't know whether he tried to go around the cab. I don't think Mr. Hughes could have gotten through that front window. I don't know whether he fell off or got off or dropped dead; I don't know how he got off.

J. Q. Adams, sworn for plaintiff, testified as follows:

I am a photographer. In June, 1925, and again in Oct., 1925, I took some photographs at the instance of Mr. Arnold up in Tennessee at a bridge on the Western & Atlantic Railroad, bridge 123, I believe it is. I took this photograph No. 9 looking north from the bridge, that is a correct photograph. That was taken October 15th, 1925. Also, photograph No. 11 was taken at the same time, looking westward across the track to a dirt road at that point; that is a correct photograph. Also photograph No. 7 was taken at the same time, looking from a position on the east

side of the track south of the dirt crossing, across northwestward to the house on the hill; that is a correct photograph. This photograph No. 12, a close-up view of the track from the west, the north edge of the crossing and certain joints here in the track. I took that picture and it is a correct picture. Also this picture No. 8, taken from the east side of the track just north of the crossing looking into the bridge; I took that and that is a correct picture. Also take this next picture taken a little distance south of the last picture, marked No. 13, looking into the bridge and showing a section of the track, that is a correct picture. Picture No. 2 shows the bridge timbers under the bridge, taken at the same time; that is correct. I made two trips up there. This picture No. 10 was taken October 15, 1925; that is looking south, towards Atlanta. This is [fol. 81] a correct picture. Here is another picture taken at different time, this was taken in June '25; that is No. 1, taken from the northeast, that is a correct picture. This picture No. 100 was taken in June, 1925, from the north side of the bridge, looking towards Atlanta; that is a correct picture.

Cross-examination:

Yes, sir, some of these pictures were taken in June, 1925, and the others taken in October. The weather, when these were taken in October, was hazy, and that made them slightly cloudy. There were evidences over the road there of weeks of rain. Yes, I put my camera where I was told to put it. I had no other particular reason for locating the camera other than where I did locate it.

I do not recall whether there had been rain in June when these were taken or not; I think there had not been any recently but that it was a clear day; the sun was shining, but the last day it was slightly cloudy.

Plaintiff introduced, also, the testimony of Emmett Finney, delivered on a former hearing of the cause, said Finney being without the State of Georgia.

His evidence was as follows:

Direct examination:

I was a locomotive engineer on the Western & Atlantic Railroad. I worked for them about 35 years; 34 years and 10 months, I was a fireman eleven years. I was an engineer about 24 years. I have run all kinds of trains in main line service only. I never did any yard work. I left the service of this railroad December 7th, 1923. At the time I left the service I was running a passenger train. On that road I came in contact with traveling firemen on [fol. 82] numerous occasions. The regular fireman on the engine was under the jurisdiction of the traveling fireman, and he was supposed to instruct the new firemen, mostly; and he inspected the engine from the boiler to the front end, and back on each side; that is what he always did with me, while I was on the road. He was supposed to be over the regular fireman. He had been a fireman, and he had been promoted. He did not do any actual firing, unless he seen the other fellow was failing, and possibly he could remedy it and help the fireman out. Every time they went with me, only on one or two occasions, the traveling firemen would go on the engine while it was in motion and sometimes would stay out a considerable length of time. Only on one or two occasions they did not. They always went out, and sometimes stayed a considerable length of time, and sometimes a short while. There is a running board on each side of the engine, and a hand-hold, for them to hold by, on both sides. There is a foot-board and a hand-hold. They walk with their feet, and hold with their hands. As to how often I would have a traveling fireman on my engine, they did not have any regular time to go with a certain engineer. Sometimes I would have one twice a week, and sometimes once a month. As to what things are there at the front of the engine that a traveling fireman can inspect; things about an engine that need inspection. They can see better on the running board all the machinery, the working part of the machinery and if there is any leak at the front end, they can see that better than from the cab of the engine. The traveling fireman is in the cab; and on this large class of engine, they cannot get out of the front window, they are so small. In

the small engines, you can get out; but now you have to go out the gangway, or go around. Possibly he went out [fol. 83] on the engineer's side. As to how that man got out on that gangway; some go out the window, and some out the gangway, and some the side of the cab; and they have a hand-hold up here; and here (witness using picture of engine of some type as engine No. 667) they can see the machinery far better, right up over it here is where the machinery works, and they can see the machinery far better here than they can from the cab of the engine. The eccentrics are up there, and the steam chest, and the cylinders, and I have went out myself, and the regular fireman. The sand pipe gets stopped up, and you have to knock it open, and you have to get, sometimes, on top of the hand-rail, to rake the sand down; and then you can go around here and see the front end of the engine here, if it is not tight. It is a very large door; if it is leaking very badly, if the smoke comes out in volume, you can see it from the cab, and when it leaks badly, you can put your hand over it and feel the suction, and you could not do that from the cab. Those rods that you see on those large driving wheels; One is the main rod, and the other is the side rod. If they are knocking very badly, you can hear them from the cab. You cannot see the rods from the cab, but right up over the running board, you can see them knock, even if they are not knocking so badly. If there is some play in the rods there—enough to enable them to thump—you can see that from the running board but you cannot from the cab. At the front end of the engine you can hear the blow from the cylinder packers. You can tell by the way the engine exhausts, how the smoke comes out, whether the cylinders are in good shape. This is the front door of the engine, now, this door is connected with bolts, and it tightens up. It is supposed to be absolutely air tight. If it is not, it gets into the fire box, and gets the fire dirty, so it will not steam. There is a place in the front pro- [fol. 84] vided for a man to get around there; he gets on what they call the beam of the pilot; and goes around on the other side. There is a way provided for him to get out clear from the cab to the running board and around the front, and on the other side, back into the cab; it has got hand-holds all in front there. There are steps going

down from the running board, to the cross bar. If an engine is standing still, as to whether you could or not tell whether the rods are working right or not; a man can go out on an engine—when I oil my engine, if there is any bad defect in the rods. I could notice it, because the braces would stand a little bit apart; they are supposed to be jammed close up together. You could tell that if there was a large defect, but when the engine is running you could hear it knocking, and you could not hear nothing standing still. The best way to tell the defect is when the engine is in operation, of course. An engine cannot stand still on the track and run its drivers around unless it is jacked up. As to the reports that these traveling firemen are supposed to make "Handling of engines"; you ascertain that fact from the cab of the engine; "Reverse lever"; you find that from the cab; "Braking good"; you can feel that from the cab of the engine; "Boiler feeding"; you discern that from the cab; "Lubrication good" the lubricator works, but they have some new ones now that work from the outside, and you cannot tell about them, the old ones worked from the cab of the engine, but some brand new engines work from the side, and if they did not work, you could not tell that either from the cab or the front; "Average scoops over fire"; they have stokers on a good many engines; that does not apply; "Imes pop open"; it pops off from the outside; you can tell that from the cab; "times rake used"; very seldom use it with a stoker; "Engine steaming"; you ascertain that from the cab; "General condition, gauge cock"; that [fol. 85] is in the cab. If the cylinder packing is blowing very much, you can hear it from the cab, but the cylinder is out near the front end of the engine. If it is blowing some, but not loud enough for you to hear it from the cab, a man standing out over the cylinder could, of course, hear it better by being right at it, right on top of the cylinder; one on each side; and you can hear right over it better than anywhere else, standing right on top of it. The cylinder packing, if out of condition, will have a continual blow when you pull the engine open. If it is not loud enough to hear from the cab, you would have to be right at the cylinder; sometimes one side blows, and the other does not; if you had to make a report on that, you

would have to be right over the cylinder, right at it. You can best see the smoke coming out of the smokestack right near the front of the engine, and by the smoke stack. You can see it better there than from the cab, at the cab you can't tell whether it is going or not. It blows backwards, but right at the smokestack you can tell whether the engine is exhausting or not, the way it blows after it gets out of the smokestack. The valves and cylinders are right together, you would have to be out in front for just a slight blow. If the rods were bad enough, you could hear them from the cab, but if slightly, you could tell by being right up over them and looking at them. If you hear a knock, even in the cab, you would have to go to find out which rod it was that was knocking; you would have to go right up over it, I suppose. To see the driving boxes right at them is the best place, but you can sometimes tell whether they are working if they are working bad. There is no way in the world to tell about a cylinder packing or a valve blow unless the engine is working, in the shop; the machinists can tell about that, but you cannot tell on [fol. 86] an engine, unless it is working. The arch of an engine is in the firebox, you ascertain that from the firebox door. "Stoker"; you ascertain that from the cab. "Firebox"; from the cab. "Fire door," from the cab; "Grade shaker"; from the cab, "Front end air leaks"; if you have to make a report on that, if the air is leaking very badly in the front end of the engine, it causes a big volume of smoke, but if there is a small leak, you cannot tell unless you go out the front, and the best way to do is to put your hand there, and there is a slight suction there. There is a leak that does not emit smoke. If you have a leak that is not so bad as to emit smoke, you find it from the front end of the engine. That is the place I am speaking of (indicating on picture). If you put your hand all around that and there is any leak, you can feel it; you can feel a suction. There is no way for that suction to occur, or to find out that leak, if the engine is standing still. In order to find that out it has to be exhausting. On the front there the headlight door sometimes comes open running along, and you have to go out and shut it, and there is nothing else on the front end there except the sand box trap, and the boiler and whistle. "Quality

of coal''; that is on the tender of the engine, of course, ''Tender loaded properly''; you find that from the cab, under the head of ''remarks,'' that would cover what he has got to say in a general way, in addition to those other things, at the bottom, under the head of ''remarks,'' it would cover any additional facts he would find *not* except those specifically mentioned. I recall that bridge up there at 123.6 from Atlanta, over the Chickamauga Creek. I never did have occasion to notice exactly what distance it was from the side of the cab to the bridge irons. I went through there just like I did anywhere else. It looks like a safe distance from the cab of the engine. I never paid [fol. 87] any particular attention to that at all. As to the effect of a low joint in the track, where there is mud under it, where it is soft, where the tie gives it causes the engine to rock from side to side, each way. I have had that experience many a time; I have been derailed several times from that effect, I thought that was the cause. As to what extent should a low joint make an engine rock, it is according to how bad the shock is; the greater the shock, the more danger. I think it will make a larger engine rock more than a smaller one. The greatest part of the rocking is at the top. The extent of the rocking of the engine from side to side depends upon how far it gave 'way, the low joint gave 'way; upon how bad a place it was; the worse the shock is, the worse the engine would rock, of course; the faster you are running, and even if you are passing a good piece of track, they will rock until they get straightened up.

Cross-examination:

A fireman on an engine does not have any occasion to go out on the engine and go around the running board and use these various methods of getting about on the engine except when the engine is in motion, that is the only way they can tell properly.

The running boards around the engine, and places that the engineer and fireman could go around outside the engine are also used by people in the shops. When a man goes out on the running board, he is above the cylinders and trucks that I spoke of. If he went to look at them, he would not

necessarily have to stoop over to look at them, he could do like this (Demonstrating); they are about even with the running board, and by holding with the hand-hold, you can see them without bending but slightly, if any; some bend over more than others, of course. Referring to those reports, one of the reports made by Mr. Hughes—"Throttle [fol. 88] pull"—you could tell that from the cab. "Reverse lever short"; you can tell that from the cab, "Boiler feed good," "breaking good;" "Lubrication," you could not tell that by getting out from the cab there. "Condition of fire good;" you could tell that from the cab. "Average scoops of fire;" this was a stoker engine; "time pop open;" you could tell that from the cab. "Times rake used;" that would not be done but very seldom; "engine steaming good" you can tell that from the cab. "Packing good" to tell that the best place is to get out on the front. Of course, if it is very bad blow, you can hear it from the cab. They are right at the cylinder. If they are blowing badly, you can hear it up in the cab. "Rods good" the best place is up right over them, where you can see them "Boxes good;" you can tell that by being out on the running board better than from the cab. "Flues good;" that is from the cab. "Stokers good," from cab. "Fire box;" from the cab. "Fire door good;" from the cab. "Grade shaker good;" that is from the cab. In order to test properly for front end air leaks sometimes it gets so bad you can see the smoke coming out, from the cab of the engine, but slight leaks, you would have to go out in front and test with your hand. Out of all these things that are suggested by this report, the things that could be best observed, by going out, are the slight air leaks that might be in the front, and the condition of the packing and the valves. I left the service of the N. C. & St. L. Dec. 7th, 1923. I was dismissed. I was accused of violating the rules. I was accused of drinking. That was not the first time I had been discharged.

Redirect examination:

I never did drink any on duty. What drinking I did, was when I was off duty. That was the only complaint made against me, so far as I know and I have got good references [fol. 89] from the master mechanic since I have been dis-

missed, so far as my services were concerned, they never claimed that I was not a first class engineer. They never did charge me with incompetency, in not knowing my job.

Recross-examination:

I was discharged in December 1923, from the service of this defendant railroad, accused of failing to protect my run on No. 90, December 5th, 1923, after having been called and attempting to sign caller's card, also for being in an intoxicated condition at time of call, but I want to state further that I never was called. They say I was, but I claim not. When an engineer is called for the purpose of being ready to go out on his run, and attempts to sign the caller's card, assuming that is done, he is on duty; I would like to state right here, if you will allow me, that if I was called, that relieves the call boy, if he claims that; and then, if I was called, why did he call another man, and the train went out on time, if he claims he called me? That relieved him, and he went and called another man, and the train went out on time, and it was not delayed a minute. Several years ago I was discharged by this same road for striking the cab of a forward train near the north switch at Rogers, while standing to take coal and water. About a year after that I was discharged for striking a train pulling into a siding at a meeting point. About a year or two ago; two or three years ago, I was discharged for leaving my post of duty before reaching the terminal, without permission, and for claiming mileage and overtime which I did not earn. When these other charges were made they reinstated me. And this last time, they discharged me in 1923, and I am now out.

Redirect examination:

This first charge, about hitting a train, that was the cold-[fol. 90] est morning I ever saw, and I think the brakes were frozen up. I think I was off about six months; this next accident they claimed out here at Bolton, Ga., there was a man pulling into a side track and I was coming around about on time, and they claimed I was a minute ahead of time. I think I stayed off a little over a year at that time. Went to the Seaboard, and worked at Raleigh, North Caro-

lina. Then I was taken back. This other thing they charged me with—leaving my engine a few miles out of Chattanooga; I turned it over to a demoted fireman. He was really an engineer, and business had fell off, and I turned the engine over to him and let him take it into Chattanooga, the superintendent and trainmaster was on the train when I got off, they seen me themselves, both of them. I was running when I turned it over to this other engineer a local freight train. That has been done ever since I have been on the road—turning it over to the fireman, if he has a lot of experience as a fireman. This man had been promoted before, but went back to fireman. That has been a custom on the road thirty-five years. This last time, when they charged me with drinking, that they claim I was drunk when the call boy got there; he came, but I never did sign any card. They tried to claim that I attempted to sign it, but I did not, and then he went off—went back—if I am a call boy, that relieves me. Then, if you don't show up at the shed or the station where you are supposed to leave from, you are found guilty. Then he called another man, and was not delayed one minute. I have at times taken too much whiskey, during my whole life, yes, sir; but never on duty. Whenever any of these charges came up, everytime I told actually what happened. As to any rule or regulation, or bulletin, order or requirement against traveling engineers and traveling fireman going out on the running board when the engine was in motion; I never seen [fol. 91] any bulletin about that while I was there. I never heard of it; they all went out when they wanted to, with me, except on one or two occasions.

[fol. 92] The plaintiff introduced, also, the testimony of Amos Shepherd, colored, delivered on a former trial of the case, and by agreement read in evidence in the present trial, which was as follows:

My name is Amos Shepherd, I live at Ringgold, Ga., now. April 25th, 1923, I lived in Tennessee, I suppose about a mile from the Georgia line.

I know the bridge over Chickamauga Creek known as bridge 123, the bridge where Mr. Hughes was killed at.

That bridge is in Tennessee. I don't know how far it is from the Georgia line.

On the 25th day of April, 1923, two years ago last April, I was hauling sand. My regular business was farming. It was wet and rainy at that time was the reason I was hauling sand; it was too wet to plow; that was the reason I was hauling sand. I guess I had been hauling sand three weeks or more then at that time.

I seen the freight train come by on which Mr. Hughes was killed. When the train come by I was I suppose about 40 feet down from the track, about 40 feet straight down from the track. I reckon I was 200 feet from the bridge I suppose. I never measured it. I was northeast of the bridge, towards Chattanooga from the bridge.

When I seen the freight train come by I seen that man out on the engine. The freight train was going to Atlanta. When I first paid attention to that gentleman he was out ahead on the engine, standing on the running board. When I first seen him on the running board ahead of the engine he was stooped over looking down at the steam chest. He was stooped over this way (indicating) looking down. When I first seen him he was stooped over that way looking down at something, I guess it was the steam chest, at the front of the engine. The train was going to Atlanta and that put his left side to the engine and he had his right [fol. 93] hand up, he had his hand up holding to something. He was looking down towards where the steam chest is.

I don't know how far he was from the bridge when I first seen him; he was some distance from it. I seen him change his position from that stooping position at the front of the engine.

I seen him when he raised up and turned his face towards the engine and changed hands and walked back, walking back towards the other part of the engine, back of the way the train was going. I seen him raise up and walk back towards the cab of the engine.

This is the way (showing) I seen him when he was stooped over this way, and turned, like this was the engine and he turned this way, around in that way, and start towards the cab.

When I last seen him he was half way of the engine, and the head of the engine was about on the road crossing then.

I don't know how far that road crossing is from the bridge but about 50 feet I would judge. That was the last I seen of him.

I did not see him when he got killed. The train stopped. The reason I didn't see him any further, I was there with the mules and they were frightened and I went up to the mules to quiet the mules, I paid attention to the mules.

The first I knew of it a little boy came running up said a man was killed, he got knocked off.

I seen him after they got him out of the creek, I don't know who brought his body out. He was dead I guess by them toting him. I had been knowing that crossing and hauling sand from there for three weeks or more I guess.

I had noticed trains going over that crossing most all the time I was hauling sand there. I didn't notice the condition of the track or condition about the crossing when [fol. 94] trains went over it no more than when trains would go over all the water would slosh over under the ties. I had noticed that. All I know when the trains would hit the crossing the water would slosh up.

I don't know whether there was any joint in the rail about that crossing, I just noticed when the ties went down. I noticed the ties and track went down as trains went over it. Several times I had noticed that when I would be waiting for the train to pass. I seen the ties give way when they hit that crossing, they would go down. I don't know how far that track went down; it looked like to me it went down that far, the length of my finger, that may be is three inches, something like that. I had just noticed that several times in wet weather when I would be there, before this accident happened. I noticed that on both sides of the track.

Cross-examined:

I live in Catoosa Co., Ga., now. I was working for Mr. George Smith at that time; he lived in Tennessee. I could not tell you how near the bridge he lived, it may have been two miles and may have been three. I could not tell you how far it was from the bridge. I was not hauling sand for him; I was hauling sand for Mr. Ira Scott, who lived down in Tennessee, but I don't know how far he lived from the bridge.

I had been hauling sand about three weeks, maybe longer, because it was raining and you couldn't plow and I was hauling sand. It had been raining all that time, it rained off and on. I couldn't tell you how much off and how much on; but it rained most of the time, so much I couldn't plow. I don't know how much of the time it rained exactly but it was raining. I didn't haul sand out in the rain; it was not raining when I was hauling sand. I had been hauling sand for about three weeks or longer, because it was raining and I couldn't plow.

[fol. 95] I was about 150 feet from the crossing when the train passed over it. When I first seen Mr. Hughes he was standing on the running board in front of the engine; I couldn't tell you how far the engine was from the crossing at that time. The train was not passing me when I seen him the first time. I couldn't tell you how far he was from where I was. I was looking towards Chattanooga when I first saw him, when the train come around the curve, after it got around the curve, and he was standing on the running board looking down, stooped over.

Then he remained in my sight till the train got to the crossing, that is correct.

I didn't see him straighten up and walk around on the fireman's side, he was on the left side; he was on the left hand side, up here on the head of the engine. He was at the head of the engine up at the steam chest when I seen him first. He was up on the running board on the front side of the engine. Then I seen him straighten up and walk along the running board up towards the cab; that put his back towards the bridge. That was the last I saw of him till they taken him out of the creek.

I saw him half way of the engine; then I didn't see him any more until his body was taken out of the creek. The last time I saw him before that the head of the engine was entering into the crossing; the hooker on the head of the engine was just about the crossing, the last time I seen him. Then he was about half way from the front of the engine where I first saw him, back to the cab, just about half way of the engine.

He was not 500 feet away from the bridge when I last saw him. I was not nearly 500 feet away. My view was not obscured by some bushes, I was away back out in the field.

I never did examine that track in them three weeks or [fol. 96] more I was working there, I never did examine it. I seen the trains go over it. I said it went down about this much, like my finger. On the last trial I said it went down, it looked to me like about three inches, you say. I didn't say it went down three inches, I might have said it went down several inches.

When it went down the water squashed up; I don't know whether it come above the rails or not; the water would slosh up sort of under the ties. I didn't pay any attention to the water, only I know it would slosh up when the train would hit it.

I never seen anybody working on the track about there when I was working there in them three weeks; I seen some men working up towards Chattanooga above there. If anybody worked on the track about the crossing, down about the bridge I didn't pay any attention to them, or anything.

Redirect:

I was not 500 feet away from that bridge behind a cluster of honeysuckle vines. There was sand back up there 500 feet away, but I was not back up there. I was just digging sand out there in the field where I could get it, two or three loads out in the field. There was sand out there, I was picking up sand all the way along there. I guess at that time I was working about 200 feet from the bridge. There was not anything at all to keep me from seeing the train. That was [illegible] time.

When a train goes by I sure will look at it, I don't fail to look a[illegible]e.

I don't know whether I remember any honeysuckles up there four or five hundred feet away or not. I never paid any attention to how much the honeysuckles were leafed out on the 25th of April.

I was up there at that crossing when you (Mr. Arnold) and Mr. Mayfield and some other gentlemen were taking [fol. 97] some photographs of that crossing, I don't remember what date it was. I don't remember how long ago it was, it was this year (1925), a month or two ago. Some trains passed there at that time.

I seen trains pass over that crossing when we were there last month, (October 1925), and the water sloshed up under

the track then, and it sloshed up all along until the last time I saw it, and the track and cross-ties went down. The track went down, it looked to me just the same as it did when Mr. Hughes was killed.

Cross-examination:

It looked to me like the track went down three inches, it may be more, at that place. I didn't look at the other place; I didn't see the other one. I looked at the side I was standing on, the one nearest the crossing. I never measured it but it looked to me like it went down that far, about three inches. I showed you, the length of my finger. When the train went over that place the water sloshed up above the ties, above the top. I don't know whether it went up above the top of the rail, but I know the ties went down. I don't know how high it sloshed up.

Mr. George Smith was standing there with me at the time Mr. Hughes was killed, he was the length of the wagon from me.

Mrs. Nora E. Hughes, plaintiff being recalled testified:

I said that I saw two trains pass this place on Saturday. I was on the left hand side when the first train came by coming to Atlanta and I was on the right hand side when the second train came from Atlanta. The first train was a freight train coming towards Atlanta. No, I was not on the side where I saw this low place next to the crossing; I was on the side my husband got killed on; I was on the other side [fol. 98] of the track from where I saw this low place next to the crossing there. Both trains were coming to Atlanta. When the next train came I was on the right hand side. I don't know what time of day it was that first train passed. We got there in the afternoon; I don't know how late in the afternoon it was, but I would say around 3 o'clock. We stayed there two or three hours.

John Headrick, sworn for plaintiff, testified:

Mrs. Hughes, the plaintiff in this case, is my sister. I recall when her husband, Mr. Ira Hughes, was killed, April

23, 1925. I was living at that time in Chattanooga. I recall on Saturday of the week after his death coming down there and visiting the scene of the place where he was killed, it was in the afternoon. There were several of us, my sister was there, my father and mother and my wife. That was on Saturday after his death on Wednesday. I climed up on the first upright piece of the bridge there to see if there was anything there. I climbed up to this place here (indicating on picture No. 100) but that is not me shown there in the picture; that is someone else. On the first upright piece of that bridge there I found some hair and also a mark. That was on Saturday after he was killed on Wednesday. That hair was some 14 or 15 feet up there. I saw Mr. Hughes after his death and saw those wounds on his head. There was a wound right back there (indicating). That is to the right of the center of the back of the head. There were trains passed while I was there and I observed the trains pass over that crossing. I didn't measure it, but I estimate that that crossing is about 35 feet from the bridge. It is a grade crossing. When the engine passed over that crossing I noticed a low place in the track and also some slush that went from under the ties, the water [fol. 99] slushed out as the train went over, and the track gave down. I saw that. That track gave down. I would say, some three or four inches at that point. The engine rocked to the right and then to the left; it was rocking considerably when it hit the bridge. There were two of those bad places and then there was one up near the bridge. As the engine entered that bridge it had a rocking motion. In my judgment and opinion that engine came in about 8 inches of those upright side pieces of the bridge.

Cross-examination:

Yes, sir, I said that I was Mrs. Hughes' brother and that I went with her to that place that day. It was in the afternoon, but I don't remember just what time. It must have been about 4 o'clock in the afternoon. We stayed there about two hours. We saw two trains pass while we were there. Those were the only trains that passed while we were there, at that time. Both of those trains were coming south, from Chattanooga towards Atlanta. My judgment is that

the track gave down from three to four inches. The spikes were pulled out of the ties about that far—about three or four inches. It looked to me about the length of my finger, about three inches long, I imagine. When these trains passed I was standing back north of bridge, just above the grade crossing there, towards Chattanooga, I was between the grade crossing and Chattanooga, but I was not there when both of the trains passed. I was there when one of the trains passed but not when the other one passed. When the other one passed I was down next to the bridge towards the creek; I was on the same side but down towards the creek, nearer the bridge. It was about 12 feet from the level of the track that I found that hair on the post, 12 or 15 feet; I didn't measure it, but that is as near as I can come at it. That was from the floor of the bridge, what I [fol. 100] would call the ties. This was on Saturday after Mr. Hughes was killed. Those were freight trains.

Mrs. John Headrick, sworn for plaintiff, testified:

I am the wife of Mr. John Headrick, who has just left the witness stand. I live at Claxton, Ga., I am a sister-in-law of Mrs. Hughes. I remember being up at bridge No. 123 over Chickamauga Creek on Saturday after Mr. Hughes' death on Wednesday. I saw two trains pass while I was there. They were coming towards Atlanta. When those trains passed over the track in the neighborhood of that crossing I noticed that the ties were loose and the ballast out from under the ties and the ties went up and down as the train went over. I should say, to the best of my estimate, that those rails went down something like three or four inches, and I noticed that it made the train rock. There was a place on each side of the track and I noticed the engine was rocking as it entered the bridge. I couldn't say as to just how much rocking there was but I saw it rocking as it entered the bridge. It seemed to me like the cab, where the engineer and fireman sit, came within 7 or 8 inches of the side pieces of the bridge, pretty close to the bridge. I was on one side when one train went through and on the other side when the other train went through. There were just two trains that pass[illegible].

Cross-examination:

We all went there together. It was getting along late in the afternoon when we got there. I couldn't say just how long we stayed there, but we fooled around there a right smart little bit. It was not dark when we left. Yes, I was on one side when one train passed and on the other side when the other train passed, and I noticed that the ties gave down when the train passed over. I was on the right hand [fol. 101] side of the track when the first train came by. There was one low place right close to the road on the right hand side; that was the one nearest to the crossing. I was on this side when the first train passed and when the next one went by I was on the left hand side—the other side. I was standing about half way between the bridge and the road, about 8 or 9 feet from the track. As to how far down the ties seemed to go when the first train passed—I didn't notice the right hand side as much as I did the left hand side, the one nearest the bridge; they went down from four to five inches. I did not notice the size of the engine but they were both these big stoker engines.

J. C. Headrick, sworn for plaintiff, testified:

I am the father of Mrs. Hughes. I live at Canton, Ga. three or four miles from the Tennessee line. I recollect going to the place where Mr. Ira Hughes was killed. We went there on Saturday afternoon, of the week he was killed; Mrs. Hughes myself, my wife, John Headrick and his wife. We were there while some trains passed over that dirt crossing north of the bridge. The trains were coming south. I noticed the track, the rails and the ties, in the vicinity of that crossing as the trains passed over. As the train passed over that dirt road the rails and ties of the track gave down and the train rocked towards me. There was a little mud and water thrown out. My best estimate is that the track gave down some four or five inches. I just noticed one place where it gave down; the train, as it passed, rocked towards me, and as it went on to the bridge it rocked back the other way, to the left. I saw the engine as it entered the bridge. It looked to me like it came within

a foot of the upright pieces of the bridge, but of course I was looking across the track and couldn't tell exactly.

Cross-examination:

[fol. 102] Yes, I said that I was on the right hand side, coming this way, and the best I could see it came within less than a foot of the upright pieces. I don't know just what time of day it was when we got to that place as I didn't have any time piece; it was just about 12 though; we had had lunch. We went there in an automobile. I don't remember whether we went immediately after lunch or not. We stayed there pretty near all the evening. It was dark when we got home. No, I didn't go right straight home from there. It was not dark when we left there; the sun was not down, lacked a little of being down. There were only two trains passed while we were there and they were coming south, I think. As to whether the engines were the same size or not, I never noticed about the last one, whether it was a large engine or not.

Millard Headrick, sworn for plaintiff, testified:

I am a brother of Mrs. Hughes. I was not present on Saturday after the killing on Wednesday when the other people were there. I went to that crossing about two weeks after my brother-in-law was killed; that was after 12 o'clock on Sunday morning. I noticed they had been working there putting ties down, and the mud and water being up on the ties. I did not at that time stand on any of those ties and I could not say that they were not firm or that they were loose, as I didn't see anything running over them. I didn't pay any attention to that, only the water and mud being on the ties. I was present there in October 1925, about a year ago, when Mr. Mayfield, Mr. Arnold and a photographer, Mr. Adams, were taking some photographs there.

Also the depositions of REUBEN P. PARKER, as follows:

Direct examination:

I live near Scruggs' Bridge, on the Ringgold Road, in [fol. 103] the State of Tennessee. I know bridge No. 123-6/10, over Chickamauga Creek, on the Western & Atlantic Railroad. That is the bridge that Mr. Hughes was killed at. I have been acquainted with that bridge eight year. I knew that bridge on or about the 25th of April, 1923, when Mr. Hughes was killed, and had known it for several years before that time. I had occasion to work near that bridge. I worked all around from thirty to five hundred feet to the bridge. I was working in sand. There is sand there, that people get and haul away. The sand has been there ever since I have been there. There is a grade dirt crossing just north of that bridge, about forty feet north of it. The bridge has a frame work above the track. Before the time Mr. Hughes was killed, on April 25, 1923, I had noticed that track near that dirt crossing just north of the bridge. I was working around it all that time. This is a low place in the track there. I have known it eight years now. This low place in the track has been there ever since I have known it; it is between the crossing and the bridge; it comes gradually from the crossing to the bridge, water runs in on the crossing. I have noticed trains go over that track from the crossing to the bridge. It has a swaying, the track sways under trains, at different places, it always differently. The low place I have reference to is on both sides of the track. From the crossing to the bridge you couldn't see any unusually low place. You could tell it when a train passed over it by the track going down; it would go down half an inch in some places, and in some places an inch, you could tell by the end of the tie; the tie went down half an inch or an inch. I don't believe I ever notice the effect the track going down had on the train. I have never noticed whether a train rocked as it went over there on any train that passed [fol. 104] over that place. I never paid any attention to that; I just paid attention to the track going down. It isn't noticed as bad in dry weather, but it has got the same spring to it at all times that I have ever noticed it. As to whether it would give away more or less in wet weather

than it does in dry weather, I wouldn't say there was any difference in it. As to what effect it has on the train when it comes over that low place between the crossing and the bridge, when the train gets on the bridge. I haven't noticed any. I have never noticed how the train acts when it gets on the bridge, from that track going to the bridge. I saw the train pass that Mr. Hughes was killed on. I did not see him when he was killed. Five minutes after the train passed I was notified that a man was hurt or killed. I crossed over the train, *when* through between two cars. After about ten minutes I made efforts to recover the body; it was suggested that someone wade in the creek, and see if they could find the body, and I went in the creek and found it fifty ties from the end of the bridge. I brought the body out. He was in the water with his face down, and when I pulled him up out of the water, the first thing I saw was a gash cut in the back of his head, and it looked like as if it was his brains floating. That gash was on the back of the head a little above between the ears. It was not hardly immediately in the back of the head. It was on the right side, the right side, a little above the ears. I saw a wound there. I saw also a bruised place in his forehead, it was near the top of his forehead, if I am not mistaken; it was in half an inch of the hair line; there were several scratched places around over his face, looked to be bruised places. He was dead when I got him out. At that time I [fol. 105] climbed up the left hand front upright piece of that bridge, at the north end of the bridge, the left hand one going towards Atlanta, to see if I could see anything. I found some hair there. I couldn't say how far was the place where I found the hair above the ground, I never measured it. It was higher than my head, twice as high as me. I am six feet high. I would say it was at least twelve feet from the ground.

Cross-examination:

I was not working in the sand bed at the time the train came by. I was at least five hundred feet from it on the side of the track opposite to the side from which Mr. Hughes fell off in the creek. That sand bed from the bridge is about five hundred feet Northeast of the bridge, towards Chat-

tannooga, Amos Shepard at that time was about forty feet, forty, or fifty feet from the track, and about five hundred feet above the bridge, Northeast of the bridge. He was on the opposite side of the track from that I was on. He was hauling sand with a wagon and team for Mr. R. I. Scott, who lived in the house upon the hill near the bridge. I never noticed anything unusual about the running of this train that day.

Redirect examination:

I did not pay any attention to whether it was rocking or not rocking at all. I have never paid any attention as to whether they rocked or did not rock, after passing over that low place. This darkey Amos Shepard was on the side that Mr. Hughes was on. He was where he could see that train as it passed.

Recross-examination:

As to his ability to see from where he was to the bridge, to the entrance to the bridge, and could see the train going into the bridge from where he was—I have never looked, I couldn't tell you.

[fol. 106] EVIDENCE FOR DEFENDANT

Defendant introduced the testimony of H. C. HILL, delivered on a former trial of the case, and by agreement allowed to be used in this trial, which was as follows:

My business is photographer for the N. C. & St. L. Ry., also the W. & A., and have been such for about 12 years. I have been doing this kind of work since 1903.

These Photographs marked each with the letters, H. I. J., G., D., C., B., E., and A. and each with the letters BBB, I took these. They were taken August 21st, and October 15th. They were correctly taken. They correctly represent what they purport to represent.

The first set of pictures were made 8th month, 21, 1925, that included the track and approach to the bridge, 123.6 at various points.

One marked on the back A-BBB, negative 1623 is taken at bridge 123.6, forty-six feet from the end of the bridge looking towards Atlanta.

The next one marked B-BBB, negative 1622 is taken from the same position but 74 feet from the bridge looking towards Atlanta, bridge 123.6.

The next one, C-BBB, Negative B-1621 taken from center of track facing Atlanta 429 feet from the same bridge.

The next one B-1620, is taken 627 feet from the bridge facing Atlanta, on the north end of the bridges towards Chattanooga marked D-BBB. Those four photographs were made October 21st, 1925.

This picture A-BBB in which the camera was 46 feet from the north end of the bridge, the camera sat about the middle of the crossing, as near as I remember.

These photographs, G-BBB, Negative A-705 was taken on the 10/15/'25 of Engine 667 on bridge 123.6, engine headed towards Atlanta approaching the end of the bridge towards Chattanooga.

This one marked H-BBB, negative A-706 engine 667 bridge 123.6 the same position headed towards Atlanta on [fol. 107] the Chattanooga end of the bridge showing the distance of twenty-six (26) inches between the running board and side of the super-structure of the bridge.

The next one is marked I-BBB, negative A-707, engine 667, same position as the other one and the engine headed towards Atlanta, is standing on the Chattanooga end of the bridge, showing Engineer Bates standing on the running board.

Photograph J-BBB, negative A-708, engine 667, on Bridge 123.6 taken from the left hand side of the track facing Atlanta behind the engine, with the engine approaching the Chattanooga end of the bridge.

This one marked on the back E-BBB, negative B-1650 taken on the 10-15-'25 of engine 667 showing a general side view of the locomotive on the left hand side.

All these pictures were taken at Bridge 123.6.

On Picture G-BBB there are figures and white line drawn from top of Cross-Beam of the bridge down to a certain point, then the side line and white line down from that to the cross-ties. Those figures represent the measurements correctly, made on the 15th when I was taking these pic-

tures in the morning about 6:30 and those measurements were made by me and these lines put on these pictures so I would have the exact figures.

The bottom line measurement starts from the base or track, and it shows the distance from there to the top of the running board which is eight feet (8) nine (9) inches, and from the top of the running board to the top of the over-head brace across the bridge shows thirteen (13) feet seven and a half (7½) inches.

The other line measurement from the side of the bridge to the running board, which is indicated here, shows there is 26 inches from the side of the cab or running board, which is flush, to the superstructure on the side, the side of the bridge.

This picture marked "H-BBB the person standing on the [fol. 108] running board of the engine is Engineer Bates. He was in charge of that engine at the time I took that picture.

In Picture I-BBB, the person standing there with their arm out-stretched is engineer Bates.

Cross-examination:

The engine was standing still when I took these pictures; I took them in October of this year, 1925.

These long ones are the one I took in August, August 21st of the track and so on.

This measurement of 8 feet 9 inches to the top of the running board, that measurement is from the cross-ties.

There is 13 feet 7½ inches on this inside white line here, and that is the distance from the running board to the cross-timber of the bridge. The rail I think is about five inches high.

This picture where the engineer is standing with his hand out to the side piece of the bridge, I think he is something like about three feet from the caboose or cab of the engine. In taking the picture he was between me and the cab and you could not tell the exact distance.

The cab would extend more than three or four feet above the running board I think. When a man is standing on the running board he is not higher than the top of the cab. Of course it is owing to the height of the man, of course. The hand-rail is made for a man extending his hand out to

catch; and that hand rail would be about even to a man's shoulders, something like that.

There is a little projection there for his feet; the running board is a little above that, about nine inches.

When this picture was taken that part of the engine was about even with the superstructure of the bridge. The reason of this elevation shown here on the pictures is because I am below the man, the camera is, when the picture is being taken.

If a man was six feet tall and standing on the running [fol. 109] board, and the camera was down on the ground in front of the engine, the elevation from which I took the pictures, the man in the picture, it would show him above the cab of the engine.

On the other hand, if you were even with him it would show his shoulders approximately on a level with the side of the cab where the roof reaches over on the side of the frame. I think a man would be about even with the edge of the cab standing there. I don't think he would be any taller.

At that point where you put your pencil on this running board I don't think a man would project above the side of the cab; if he was standing at this point here on this little projection he has got to reach above his head that way or about even with his face to get around there.

That is not made for a man to go out the gang-way and get on the running board, or to go from the running board into the cab, but they use it for that when the engine is standing still, to toe around there. I never had any instructions about a man climbing around on it, and don't know anything about that.

Anyhow that rail is up there at the top of the cab, and a place is there for his feet where it can rest in going around the side of the cab. He can go from there onto the running board, and from there to the gangway, by the window.

From that part of the running board where it joins the cab to the top of the low side, the extreme left side of the cab, the roof there, how many feet would I say it was, I don't know, I would not like to say or estimate it unless I actually knew. That running board is flush with the side of the cab.

J. B. Bates, sworn for defendant, testified:

I am a railroad engineer for the N., C. & St. L.—the W. & A., running from Atlanta to Chattanooga. In April, [fol. 110] 1923, I think I was firing Yes, I was firing the month that Mr. Hughes got killed. This photograph marked H.B.B.B., negative A-706, is a photograph of engine 667. That engine is standing on the north end, or Chattanooga end of this bridge 123.6. That is myself standing there on the running board. I drove that engine down to the bridge that day. This picture marked L.B.B.B., negative A-707, showing a man standing on the engine with his arms outstretched—that is me too. The same engine and the same bridge and on the same day. This picture marked G.B.B.B., negative A-705, is of the same engine and the same bridge. These measurements indic-ted on that picture were taken on that day and they are correct. I have been a locomotive engineer about two years. I went to firing in 1908, on the same road, between Atlanta and Chattanooga. I am familiar with the bridges and crossings between Atlanta and Chattanooga, I passed over them most every day. When I went down from Chattanooga to Atlanta with this engine that day I passed over the road crossing just north of the bridge, its condition was all right so far as I could tell. As to the effect on the engine, supposing the railroad track is in such a condition that the rails and cross ties, when the engine is running over them, at a point near that crossing, and then on the opposite side near the bridge, would go down from three or five inches—unless it was a long space you wouldn't notice it with an engine of this class, a long wheelbase. If it went down from three to five inches just south of that crossing, say from twenty to twenty-five feet further on towards the bridge, you wouldn't notice the effect unless this low place was a good long space, you couldn't hardly notice it; it would rock a little bit. I didn't run an engine any, as engineer, until after Mr. Hughes' death. In passing over *the* that place as fireman on the engine during the time that I was running as fireman over there, I never observed any [fol. 111] conditions that would make that engine rock and go with- 6 or 8 inches of the side of the bridge. As to the width of the cab of that engine as compared with this engine 667, and as compared with other engines which I and

Mr. Hughes had used and worked on passing over that place—they are all about the same, I suppose, as to the width of 667 as compared with any other engine that was used there at the same time and before 667 was used—I don't know the exact measurements of it, they all appeared to be about the same.

Cross-examination:

Up to the time of this accident I was running as fireman and Mr. Hughes was travel*l*ing fireman. I suppose you would call travel*l*ing fireman a promotion from the ordinary fireman. All firemen are in line of promotion for the job of engineer; every man who gets to be an engineer has gone through the apprenticeship of a fireman's job. The average pay of an engineer on that road, I suppose, is $240.00 or $250.00—along there. The fireman's main job is keeping the engine hot. The engineer is the pilot who looks out for the track and so on. No, sir, I never had noticed the exact distance between the side of the engine and the upright pieces of the bridge but I know it was over one foot, how much *oth*er one foot, I don't know exactly. Yes, I ran through hurriedly in the discharge of my duties and it was not my business to measure those distances. In making a sure enough test of the condition of the cylinder packing on an engine you wait until they stop somewhere and test the cylinder packing when the engine is standing. Yes, sir, I remember a bulletin with reference to firemen and engineers going out on the running board of an engine while in motion; there has been maybe two or three since I have been on the road. They put up one — them way back 12 or 15 years ago—the first one. To test for a front air leak in an engine, you can put the blower on and go around with a torch and wherever there is a leak it will [fol. 112] draw the flame into the opening. You couldn't hardly tell it by putting your hand there. That is a hot place and I don't think you could put your hand close enough to it to test it without getting your hand scorched. This engine 667 has a running board, it is right up against the end of the cab. That running board does not extend along the side of the cab. There is the bottom of the cab, or the flooring, that sticks out maybe an inch and a half or possibly two inches along there that you might possibly put your foot on.

The condition of the side rods is best discernible, I think, from the cab.

Yes, the front end of the engine is hot. You couldn't touch it slightly or put your hand at it momentarily and take it away without getting scorched. No, you couldn't put it in half an inch of it and feel the draft. Oh, yes, I have seen people touch fires slightly and touch coals without getting their fingers burned much. As to telling that there was a leak in the front end—I don't think you could hold you hand there long enough to tell. I don't know how long it would have to stay there if it was a pretty good sized leak. As to the draft being pretty strong if it was a large hole—you could see that if it was large enough. I never have been able to feel one with my hand, and I have tried it. You can hear it but not feel it. If there is a leak the draft comes in. By putting your ear close you can hear it, but you don't want to touch it. If the engine is standing still you can hear it all right. If the engine is running the exhaust makes so much noise you can't hear it. There are front leaks, if there is any leak, that is where they are, right around there. The smoke box is at the front end. That thing that looks like a barrel there with those rods running in and out of it is the cylinder; we have packing in there. That packing is around the piston head that runs [fol. 113] in and out. If that packing is in bad shape and the steam leaks by it you don't get the full pulling power of your engine. The packing ought to be sufficient to prevent any leak in the steam there. As to its making a noise out there at that cylinder when there is much of a leak—it is a pretty hard matter, you can't hear noises out there. Of course, if you lean over pretty far you might hear it or might not, depending on the degree of the leak. If this is the running board on the engine (illustrating), like the engine was facing that way, that runs out to the side of it and comes pretty near up to the front of it. When you get to the end of it here you are pretty near over the cylinder head. No, sir, if a fellow leans over that way and there was anything down there he couldn't hear a thing in the world because it is too tight down there. You have to be up here to hear it. Yes, sir, if the packing is out of condition there may be leaks of steam pass the piston rods. That makes a noise when it is in that condition. That noise origi-

nates there in the steam chest. As to where you can hear that best; close to it or further away from it—I have always heard it from back in the cab. I don't know about hearing anything better close to it than further away from it. I have never been able to hear it up there; I always have been back in the cab. Yes, sir, the general rule is you can hear a thing the closer you are but you can understand a little better sometimes when it is further away. This big barrel like thing here at the front is the cylinder. That top thing there is the valve chamber and this low one is where the piston rod goes in. You might hear a noise up there but you don't know exactly where it is. Yes, the noise is right in there (indicating). I can't make a noise like it. Yes, sir, if a fellow is on the end of the running board he is right practically above that place. I don't know how many feet I am away back in the cab here, but the sound [fol. 114] comes right back here. I can't say whether that is about 30 feet or not; I don't know the exact distance. Yes, when I am back here I am inside of the caboose. That caboose has a roof on it, sides to it and a front to it and a small window in the front. A large man couldn't get through that window. It has two side windows, there are two sections of it, two on each side, in most engines. You see there are two windows right there (indicating). Yes, sir, a man out at the end of the running board there is much nearer the cylinder than I am. By leaning out of the window he could see the top of it. Yes, sir, those side rods get out of whack sometimes; they pull loose, pounding and knocking. You are right over them on the running board. There is a place provided around the front of the engine, a space on each side for a man to go down from the running board, step down on the top of the pilot and go around on the other side. You can get out there on the running board and get very close to the smokestack. Yes, sir, the less smoke you have the better firing you are doing, and the heavier and thicker it is they conider the less heat you are getting. Yes, sir, you can see that smokestack better close to it on the end on the running board. As to the cinders going back of you if you are right close out there—you won't be under the smoke; you are by the side of it. That's why the cinders would not hit you up there as much as further back. Yes, sir, if your engine is standing still you

can positively tell whether or not there is a leak in the packing. The operation you have to open the cylinder trap and pull the shudder open and the steam will come out if it is wrong. You want the engine to stand still when you are making a test of that kind. You put on the brakes so it can't move and then you turn a small amount of steam in. Yes, sir, that steam is also turned in when the engine is moving and [fol. 115] you get even greater steam pressure when it is moving. Yes, sir, the noise is there but I think you couldn't hear it because of the other noises. As to whether there would be much more steam pressure running than there would be standing—that depends on how much steam you give to the test. There is a cab on this engine at the end of the running board. No, sir, I said that a big man couldn't get through that little window in front. Hughes was a tremendous man but I don't know how tall he was. He was a good deal larger than I am. He couldn't get through that little window. Yes, sir, in getting around that cab there is a hand hold to hold to on the top of the cab, fixed for that purpose, and there is a space you can put your foot on around the cab there. This picture shows it around the bottom of the cab there. A can can, if he is careful, get a hold on that with his foot and hold up here with his hand. I don't know just what use that thing is put there for but it is a safety appliance, for you to hold to to get around, I suppose, I have seen it done that way. A man going from the cab hold up there and get around that way and get to the gang-way. As to this bulletin dated "Atlanta, Ga., May 23, 1923, to engineers and firemen, your attention is called"—that sems to be the same one. Yes, sir, that was after this man was killed. I saw one like that before this man was killed; there was another one before that but I don't remember the date. I couldn't say whether it was in 1908 or 1910, but along back there there was one. I don't know about its staying up on the board two or three months. I don't think I testified that it stayed on the board two or three months and then was taken off. I can't say how long it stayed on the board because I don't know. I don't think it was on the board when Hughes was killed, but I don't remember. I don't know how long this one stayed on the board. If it is on the board now I haven't

[fol. 116] saw it. Yes, sir, I am familiar with this rule book. As to my pointing out a rule in there on that subject—there is one in there somewhere about a dangerous practice, but I don't know just where it is. No, sir, it doesn't say anything about the running board; there is nothing in there about the running board. I said there was one like this many years ago. I don't know where that is now. I haven't sen it in years. I don't know how long it was the habit to let those bulletin orders stay up there when they posted them; I never paid any attention to how long they stayed up there. I just read them one time. They take them down after a while but I don't know how long. In case a fellow is just employed and they take the bulletin down and he never sees it, they tell him about it again after a while. It is pasted up on the board they have got there, a bulletin board they call it. It stays up there a certain time and then they take it off. No, sir, I have not frequently gone out on the running board of my engine when it was in motion. As to having testified before that I have gone out on my engine on several occasions, it was in slow motion, when they are climbing a hill. Yes, it is in motion. I said that I had climbed out on the running board frequently and knocked the sand loose. Yes, sir, you have to get out on the running board to go out to knock it loose with a hammer. I have gone out on the front end of the engine to fix these rods when it was standing still, but not with the engine running. I couldn't say in what distance you could stop going down hill at 40 miles an hour. The sand box is a little towards the front of the boiler. To reach the sand pipe you don't have to go almost to the extreme end of the running board but you would be past the middle. Yes, sir, you have to take a hammer to knock it loose when the sand gets stuck, sometimes, and sometimes that won't do it. Yes, sir, you can go out the gangway and [fol. 117] put your foot on that rod and hold to the hand hold by that and get out that way, but it is easier for me to get out the window; get out the side window of the cab. Yes, sir, if I got out the side window I would hold with this hand here (illustrating). You would not necessarily have to use one foot on the rod; one foot in the window and the other foot reaching around. In other words, you can get in the window or get in the gang-way, either way you

want to. I am talking about the side window. I am too big to get through the little front window, I could hardly make it.

At the time Mr. Hughes was killed this engine 667 was a new engine. If the engine was in forward motion and there was an air leak the suction would draw the packing inside; it comes in towards the inside, don't go out. As to how close you would have to put your ear to that place to hear the in-take of that air, with the engine in motion—I don't think you could hardly hear it with the engine working at all, unless it was a good big leak. When you get out on your running board and get above that cylinder, there are other noises of the engine in motion. The exhaust from the engine makes so much racket you couldn't hardly hear. As for these places provided for getting around an engine—they are used at any time when working around the engine, in the shop. No, sir, a traveling fireman is not a regular fireman at all but he works all right. He does the actual firing of the engine for the purpose of showing the other man. The fireman is supposed to obey his instructions. No, sir, he doesn't boss the engineer at all; he and the engineer are perfectly separate from each other. The engineer has got charge of the engine and looks out for everything that happens on the engine but he doesn't undertake to tell the traveling fireman as to how he shall instruct the fireman or perform his duties. No, I don't suppose [fol. 118] that the traveling fireman is under anybody on the train as to how he shall perform his duties. I don't know what the instructions are on that.

C. M. Darden, sworn for defendant, testified:

I am a mechanical engineer of the Nashville, Chattanooga & St. Louis Railway—Western & Atlantic Railroad. I have been with this road since 1912. In the line of my work I have something to do with the testing and supervision of the locomotives on that road; it is my business to design and supervise the construction of all locomotives. I am familiar with the type of the engine 667 of the W. & A. Railroad. That engine has been in service about four years.

I personally examined that engine when it was delivered to the W. & A.; I examined that engine at the builders before it left the works. I was familiar with the widths of engines used over the W. & A., up to the time of Mr. Hughes' death. As to the width of engine 667 as compared with other types in use on the W. & A. prior to the death of Mr. Hughes—the width is less on those engines than on other engines that are used on the W. & A. Railroad. The maximum width of this engine was 10 feet 3 as compared with other engines—compared with engines of 10 feet 10 inches. The average width of the engines used in the freight service on this railroad prior to the death of Mr. Hughes would be about 9 feet 4 inches; all the smaller type engines, and the class of engines used just prior to the use of this class was 10 feet 6 inches as compared to 10 feet 3 inches, for this particular engine. Those engines which were 3 inches wider than this engine 667 had been used on that road since 1916. The best method of testing front end air leaks is while the engine is standing still, with a light torch. Any leak in the front end will show by the flame of the [fol. 119] torch being sucked into the front end. The way you do this is, I say, while the engine is standing still. The suction is produced by the blower. You open the blower and it creates a draft through the fire box, the flues and front end, which causes the flame of the torch to be sucked into the opening that might be in the front end. When the engine is in motion the temperature at the front end of the boiler is approximately 500 degrees Fahrenheit. As to how the stability of that type of engine No. 667 compares with other engines in use on the road, as to its liability to rock—this engine is of the very latest design, the last work in locomotive building, up-to-date, and is equipped with lead trucks, a controller truck of the latest known and approved design to prevent any excessive rocking. The controller truck on these engines is of one piece cast steel and has out-board centering and side bearing plates to support the engine at the rear under the centers of the engines and prevent rocking. Engines built prior to this were of a different design of controller trucks. In this particular type of engine the boiler sets lower than on other engines operated on this division. In the progress of an engine over a track that was in excellent condition, an engine a

few years old, there would be practically no rocking. Supposing that the track was in such a condition that some 40 or 50 feet before the entrance to a bridge there was a low place and in passing over it the engine depressed the track from three to five inches, and just after passing that, on the other side some 30 feet from that low place there was another which would produce a similar result, it would derail the engine. It would make a difference as to whether that low place, or place that was not properly supported by ballast, was at a joint, since the low place between rail joints would be supported by the strength of the rail itself and any low place would be taken care of as it passed over [fol. 120] the depression, in its pendulosity and come back up and the weight of the engine would be supported by the wheels over on the solid ground. The length of that engine from front to rear is 83 feet 6 inches; the length of the locomotive itself from the center of the engine truck to the center of the control truck is 34 feet 11 inches. That engine is fired by a mechanical stoker operated by the fireman. The coal is on a tank in an inclined shaped hopper leading down to square conveyers in the bottom of the coal space, and the square conveyers's is horizontal and carries the coal to screened conveyer elevators located at the rear of the boiler. Two of those elevators incline in a V shape and carry the coal up approximately 5½ feet to the distributor mantel which has air jets at each of these two openings and it is distributed over the fire box and over the grate at a uniform thickness; and that is under the control of the fireman. He can increase the coal supply by cutting down the speed of these conveyers and cutting down the force of the jets. He doesn't shovel in the coal but he can sit on his box and fire from one end of the line to the other. I am familiar with the duties of a travelling fireman. They are to instruct young firemen and see that the firemen carry out these instructions as to the operation of the stoking of the engine to comply with all rules and regulations as to safety. The engineer is in charge of the engine; that includes keeping water in the boiler at the proper height, and he sees that the fireman performs his duty satisfactorily, and he operates the entire engine according to rules and instructions. While the engine is under his charge it is his duty to see that that engine is in A-1 condi-

tion, and to report at the end of the run anything in the working of it that is to be done in that engine.

Cross-examination:

[fol. 121] A traveling fireman generally reports to the chief traveling engineer and the master mechanic. He is furnished with a regular blank report to fill out. Yes, sir, these blanks indicate what his duties are and whatever he had got to report on he has got to investigate. If he has to report on the throttle, that means if the throttle will open and close properly. If he has to report on boiler feeding, that means the injection for instance of water into the boiler, there must be a proper and sufficient supply to keep the water level. If he has to report on the condition of the fire, it means that the stoker and grate—the condition of the fire box is such that the fire is not interferred with. Whatever the condition is he has got to report it. That does not mean that he has got to take some other man's word for it, but he has got to know about that himself. If he does his duty he has got to know these things that he has got to report on. "Times of pop opened," that is a safety valve, a valve that lets off certain pressure. The boiler pressure is 200 pounds on these particular engines and whenever the pop opens that indicates that he has an excessive amount of steam and these pops open and let that out and we have him to report that as an indicator of whether the fireman is overfiring the engine and wasting coal. "Engine Steam"—that means that he is to report if the engine is steaming good or bad or fair. If there is anything that interferes with the steaming of that boiler then he is to determine and mark it on that report. In addition to the air brakes on an engine he has, on a locomotive, what we call an independent brake, an automatic brake.

The independent brake brakes only on the engine and the automatic brake brakes both on the engine and the train. "Lubrication"—that is that all parts of the engine are properly lubricated and that *that* the lubricators are prop-[fol. 122] erly functioning—that means the oil. "Average Scoops per fire."—that form would not fit the stoker. The proper answer to that would be stoker. "Times Rake Used"—they report on that. Under "General Conditions"

he reports, among other things, on the gage cock. All of our engines are equipped with gage cocks and water glasses. The purpose of the gage cock is to allow the engineer to determine the height of the water in the boiler, he also has the water glass which shows the water in the boiler, and the gage cock is a check to see that the water glass is functioning properly. The rods in this form of report refer to the side and main rods. There is a rod that comes out of the steam chest by the side of these wheels and there is one that connects at the head of the cylinder and goes back to what we call the main drive wheel; that is the main rod, and the other rods, the side rods, are the ones connecting each pair of drivers, making them turn in unison. There is a big rod that goes out to the main drive wheel. The side rod goes from that wheel to the wheel behind it and one from that wheel to the wheel in front, those are the side rods, those are the rods he is to report on. He also has to report on the stoker; that is a mechanical stoker operated by steam power; the steam from the engine operates that also. That grate shaker is a lever for operating the grates in the fire box, to shake the ashes out of the grate. As to these leaks in the front end, there is a small amount of suction there all the time, the natural draft up through the smoke stack like the draft up a chimney, but when you put the blower on that increases the draft. That item here "Tender Loaded Properly" means a distribution of coal, that the coal is properly distributed on the tender, properly tramped down so none of the coal will fall off. This packing in the steam chest, around the piston head—that is the packing rings on the cylinder, the piston in the main cylinder. If the packing [fol. 123] distintegrates and you lose some of it it is not air tight and the steam will blow by and you will lose power. Yes, he has got to report on that; and he has got to report on the flues, whether the flues are leaking. As to the fire box, he has to report whether the fire box is in good condition. Valves—that means the valve located just above the main cylinder, whether they are in good condition. Arch—that is the arch brake located in the fire box, there are arch tubes running into the back head and these arch brakes rest on this arch tube, that causes the flames and the gas to travel around this arch before it can get to the

top. In case he wishes to look in the fire box he doesn't open it any more like he used to with the end of a shovel, a pick or something, but there is a chain fastened to the boiler head and they pull on that chain and raise the lid. He reports on the quality of the coal on the particular trip. Yes, when the traveling fireman turns in those answers he is supposed to hand them in at the end of every trip. One goes to the chief traveling engineer and the other to the master mechanic. He is supposed to make that report in good faith, on his own knowledge. The difference between an incompetent traveling fireman and a competent one would be a man who looked into all of these things and did the best he could to find out about them, and one who didn't. These forms were gotten up by the chief traveling engineer and the experience of machinery experts, from the experience on this and other roads, to get the best that there was. In other words, it was carefully thought out from these experiences, after getting the best ideas from other roads, and through the traveling engineer's association. The height of that engine, or of the cab, was 12 feet 6 inches, from the eaves to the top of the rail. The running board on that particular engine would be approximately 7 feet 6 inches. I would say, to the top of the rail. The boiler part of that engine was 34 feet 11 inches long; that [fol. 124] is, the wheel base of the locomotive; that means from center to center. From the front point, the very furtherest point, which is the tip of the cow catcher or pilot, to the end of the cab or gang way, would be about 37 feet. The tank is about 25 feet. The whole locomotive, from center to center of coupler, was 83 feet long; that includes the tender. The length of that engine from where it couples on to the front of the cow hooker is 83 feet 6 inches. I said that a drop of five inches first on one side of the track and then on the other side of the track would likely derail the engine. No, there never has been any invention that will absolutely take care of a depression on one side so as to keep it from rocking some—not to the extent of a few inches—not in my opinion. What I mean is that the wheels will go down in a depression and up while the other wheels are still on level track. The box would go solid against the frame and to make it finally fall off, that five inch drop woud have to be of considerable length

so that more than one pair of wheels would be in it at the same time that would cause the coming over motion; if it was long enough, I mean, for more than one wheel to go in at a time; if two wheels would get in it would cause it to go over. It depends on the length of the low place. The comparison you use with the table legs, dropping the legs on this side say one inch—that would not be comparable with a locomotive. As to how far that table would go over—a fixed object of that kind, there would be a definite rule; it would go over just as far there, if it were the same distance, as this side would be higher than the other side. That is overcome to come extent, I think, on a locomotive, through the springs and these other things that we have. The effect is to neutralize that as much as we can. Yes, I judge the effort in making automobiles is to overcome that. Yes, you can always reach a point where [fol. 125] you can even turn one over, a locomotive or any other vehicle, if you get both wheels off on the road or if you get both wheels in the rut. You would have to get all of the driving wheels in the low place to make it go down on that side. Those driving wheels are made 66 inches apart. No, sir, I don't run an engine, but I have run one experimentally to see how it would go; I never ran one as a regular occupation. Yes, I am a sort of locomotive architect. I don't believe I could answer the question as to what size engines were run on this road 35 years ago, I can't answer that far back. I can go back to 1912. The engines at that time were 9 feet 6 inches in width. Yes, since then some of the biggest ones have been 10 feet 7 inches. These particular engines were 10 feet 3 inches maximum; they were 2 inches shorter than the largest ones. The largest ones we have down here on this division are 10 feet 10 inches, or seven inches narrower—3½ on each side. I couldn't answer as to how many of those bridges of that type of structure we have, or as to whether we cross Chickamauga Creek, 13 times. Yes, I have been over the road but I am not familiar with the roadway, the bridge construction, or equipment. There are no items on this report for traveling firemen that has been referred to that make it necessary for a traveling fireman to go out on the running board of an engine while in motion to determine them.

H. G. RITCHEY, sworn for defendant, testified:

I am a supervisor of tracks on the N. C. & St. L., on the north end. I was supervisor of track in April, 1923, the month Mr. Hughes was killed. From the 60 mile post just north of Kingston to the 132 mile post, practically from Kingston to Chattanooga. That includes this track and bridge where Mr. Hughes was killed. I have been supervisor since the 1st day of March, 1915. I had been over [fol. 126] that particular track at that place the day before, or two days before Mr. Hughes was killed, and I was there the next day after he was killed. As to the condition of that track at the time Mr. Hughes was killed—it was just newly overhauled; every tie was new from the north end of bridge 123.6, where Mr. Hughes was killed, to the south end of bridge 124.1, and it had been ballasted, and it had been tamped inside and out and filled out roughly. About 1,000 feet north the water had not been dressed down, but the track had been tamped smooth and filled in; from the north end of the bridge, that is the end towards Chattanooga, for 1,000 feet towards Chattanooga, it had been tamped. We had already put the ties in between the two bridges and we had one tamped, had to give it a final smoothing and tamping for about 1,000 feet more. All the ballast had been unloaded and put in the track, filled in between the rails and the ties, and nothing remained to be done except this dressing off of the water to make it sort of smooth above, make it look a little better. The condition of that track from the north end of the bridge for 1,000 feet towards Chattanooga, so far as the lining and surface of the track was concerned, was just as perfect as a track could make it, there wasn't any defect in it; that is so far as the track is concerned, in the lining or surface. The border had not been smoothed; that was the only defect, you might say, it hadn't been dressed off; just the looks of it is all. I don't know exactly how far north of the bridge that first rail joint is, but I believe it was 21 feet. We have a 66 foot rail in on one side. The standard length of those rails is 33 feet but I think we had one 66 foot rail; removed the joint near the crossing on the west side. On the day that Mr. Hughes was killed there were no low joints therein that 1,000 feet of track that I have testified about. At no point

within that 1,000 feet on the north end of the bridge was [fol. 127] the condition of the track such that the rail would go up and down several inches when an engine passed over it. It might possibly have done it from a quarter to half an inch at some place, but that is a usual thing and does not interfere with efficient operation of the train. The foreman on that section was W. A. Holcomb. Just before Mr. Hughes' death he and his gang had started in at the north end of this bridge and surfaced back north for about 1,000 feet to the first rail—about 1,000 feet north of the bridge. They had been engaged at that work most of the time for about a month, because they had timbered between the two bridges, unloaded the ballast and started surfacing. In doing the work necessary to do the things that I have described, doing it in the day time, people could have seen that foreman and his gang of men.

Cross-examination:

I believe there are about five of those covered bridges on the north end of the road, let's see, there is 123.6 and 128.3—no, there are four now. They had taken down one a short time before the last trial. That is the only one that I recall that has been taken down. Yes, sir, this railroad crosses that creek 13 times. Yes, sir, there are four bridges of that type and 9 of them without any tops or sides to them. Those things that appear there in this picture No. 100 are not guard rails that we were going to put in that track; that was a rail that was to have been put in inside of the main track there; they put it in afterwards. This picture No. 9 shows it in. I don't recall just the dates when that guard rail was put in there but it was after this accident occurred. There is a frog in the center of the track here and in case a wheel gets off back here this leaves the wheel back. That is to avoid derailment. Yes, that rail is spiked into the ties, but it is not put in there to strengthen the track in any [fol. 128] way at all; it doesn't have a thing to do with strengthening the track. No, if this joint here (indicating) was low that inside rail spiked to the ties would not hold the track up. The ties being spiked to that rail would offer very little resistance. That was put in to re-rail a car in case a car got off, not only at this bridge but all over-head

bridges. Yes, to support that track it seems the guard rail would have to be under the ties, but it was not there to support the track at all. Even if all of the ties are spiked to it, it will not tend to hold it up; there is no weight on that rail. The weight goes on the main rail and causes it to pull the spike loose. I am still working for this road. I am responsible for the condition of the track along there—for my part of it.

W. A. Holcomb, sworn for defendant, testified:

I am section foreman for the N. C. & St. L., that is the W. & A.; section 25; Graysville, Ga., between mile post 119 and 125. In April 1923, I was section foreman on the same section. That section includes the approach to bridge 123.6, the bridge in which Mr. Hughes was killed. On the day that he was killed I was working with my hands north of bridge 123.6, about 800 or 1,000 feet north. I was smoothing and tamping the tracks. Before that time I had been surfacing and tamping the tracks that went back to the bridge, and before that I had overhauled that track from bridge 123.6. By overhauling it, I mean I had raised it and put in all the ties new, unloaded ballast and filled it up and tamped the ballast. There wasn't anything to be done to that track except to take the little ballast that was scattered along on the bank. I hadn't given it a final dress. I have been section foreman since 1917 and have been on that particular section. I say that the condition of that track from the [fol. 129] north end of that bridge for 1,000 feet towards Chattanooga, on the day Mr. Hughes was killed, was good. There were no low places at any point within that stretch of track. There was no place in that track where when an engine or train passed over the track it would work up and down from three to five inches throwing out muddy water. I don't remember how long I and my hands had been working on that stretch of track just prior to the time Mr. Hughes was killed, but a month or more, but not every day. I generally have from seven to ten men in my section gang. Yes, sir, working along there with my men pretty much every day for a month, doing the class of work we had to do, we would be visible to the human eye; anybody

could see us and watch there. The first rail joint north of that bridge is 22 feet, I believe and the second one is 55 feet. I had known Mr. Hughes before he was killed. I saw him the morning he was killed. When I saw him I was about 800 or 1,000 feet north of bridge 123.6 and Mr. Hughes was out on the front of the engine, standing out there on the front of the engine when the engine was coming around the curve approaching me. That curve is about 1,700 feet from this bridge. He was standing out on the front of the engine when he came in sight of me and he seemed to be looking down at something, I don't know what it was. Just about the time he got to me, or just before he got to me, he turned around and hollered—waved at me—threw up his hand. When I say he was standing on the front of that engine, I mean in front of the boiler, that space in front of the boiler just above the cow catcher. He was smoking a cigarette. I don't believe I remember what sort of morning that was, but it seems that it was a fair, clear day. It was about 8:30 or 9 o'clock, the best I remember. As he waved it seemed that he turned and started back to the engine. I never observed him after that. I never saw him [fol. 130] at any time after that before he was killed. When the train came to a stop the caboose was just north of the bridge, that is, on the Chattanooga end, the engine was south of the bridge; part of the train on the bridge; of course the engine was south of it. I went down there to the bridge. Mr. Hughes' body had not been taken out but it was taken out while I was there. I made an examination of that first upright piece of the bridge and I found a little impression there of blood and hair on the bridge, on the east side of the track, that was on the first upright. That was up 13 feet 6 inches. The distance from the upright post to the bridge was 14 feet 2-½ inches, I believe. Coming from the direction of Chattanooga, you can see that bridge from an engine about 1,300 feet. With the engine coming towards Atlanta, if Mr. Hughes turned and went around back towards the cab, that threw his back towards the bridge.

Cross-examination:

Yes sir, I say that when I first saw him he was around on the front, right above the cow catcher, looking down at some

object. He was about the center of the engine. I don't know what he was looking at, but he was looking down. I couldn't tell whether he was looking towards the cylinders or not, but whatever it was, he was standing up at that place looking down at something. I could see that he had his head down. After that he saw me and waved at me; then he turned his position and looked as if he was starting back. Yes, I have seen low places in a track, I have had a few low places on my part of it. No, I don't hate to admit that I had low places. Our job is to maintain the track. Low places are not generally at joints but occasionally they are; not over 50 per cent. Naturally the track would go down where there is a wet place. There wasn't any water coming down there from that hill at that time; that place [fol. 131] didn't get wet at all. That track was not soggy and muddy, but it is a little now. Yes, there was some sand there in October of last year. This picture No. 12 doesn't look like that crossing. If that is the crossing this is the south edge of the crossing I suppose. Yes, I can see evidence of water washing out between those ties and around the joints and sand in there. I am still working for this railroad and have the same section. The section boss there is responsible for the condition of the tracks. Looking at this picture No. 7 I see that wash there between the ties; that track was not in that condition at the time of this accident to Mr. Hughes. It is not in that condition now—not like it is in this picture. Yes, it has been in the condition that picture shows. I don't know the date that picture was taken but if it was taken October 15, 1925, it was in that condition then. As to the water washing all that ballast of dirt away—it is not washed that way; I had that dug out because it was muddy. No, that is not a wet place. This next picture, No. 12—yes, it was in that condition, but I don't call that washing myself. I had that dug away on both sides. In this picture No. 8, that is sand, but it is not sand that washed under there. No, I hadn't dug anything away in No. 12. That is not a pretty wet place except after a big rain. This picture No. 11 that is shown me represents the road approaching the railroad. That is a view from the west side looking towards that crossing. No. 8 is a good picture of that crossing. I dug this out here (indicating),

but that is not on the crossing. You see, the train blows this sand in there when it is dry and dug this out in order to tamp the ballast. Yes, sir, it blows both ways—north and south. I dug thus out here because it has become foul. That in that picture is becoming foul. No, I hadn't taken it out on the north side in that picture No. 8. The sand drifts in amongst the rocks. When I finished overhauling [fol. 132] there it was over twelve months before my attention was called to that track at that crossing. I said the width between the upright pieces on that bridge was 14 feet 2¼ inches. I don't know the width of an engine of that size; 14 feet 2 inches ordinarily. I said that I climbed up there after the accident and found some blood and hair 13 feet and 6 inches above the floor of the bridge, on that post; the first upright post on the left, the way it was going. The blood and hair was on the edge of that post like—the first edge towards Chattanooga. The reason I did no work on that part of the track for twelve months after Mr. Hughes was killed was because it didn't need it. I was there from day to day and observed the passage of trains over that track and bridge. They passed over very smoothly. There was no swinging motion of an unusual character of the trains that I saw. I judge that there were about 20 trains at that time passing over the track daily; maybe a little more. As to why I was watching that track, I watch all the tracks; I watch to see if they rock. I said I hadn't done any work on this track in twelve months after the accident; there hadn't been any trouble for twelve months. As to a complaint being made in this suit when it was filed, of that track there— I was not told of that until I came down here at the other trial in December of last year. No, that was not the first time I had been over it. I don't know about when the suit was filed, but they told me there was some joint missing. No, sir, I didn't go to look at the joint at that time; I had been seeing it daily. I have six miles of track to keep up; from the 119 miles post to the 125th. Yes, sir, I know what a long joint in a track is; I have seen them. A low joint doesn't have any practical effect on the motion of an engine or car; it doesn't rock the engine if it is just low joint; just a low joint doesn't rock it at all; it [fol. 133] takes a long space, something like the length of

the engine. If it is long enough for two of the drivers I don't know whether it would rock it or not. Yes, sir, I have seen an engine rock. My engines rock sometimes. I have not talked with Mr. Darden out there about how long a low place it has got to be before it will rock the engine; I have not talked with him at all. I don't pretend to say how long place in a track it must be before it will rock an engine; I might say about 15 or 20 feet. Yes, sir, if you have a low place on one side of the track about 20 feet long and then another place on the other side of the track, it would rock it. If, in a train passing through that bridge, it rocks and throws the cab of the engine within a few inches of those batter pieces—I have never seen an engine rock that much.

Lester Norton, sworn for defendant, testified:

I work for the Luke Bridge Construction Company at Graysville, Ga. In April 1923, When Mr. Hughes was killed, I was working for the N. C. & St. L. road for Mr. Holcomb; I was a member of the section crew that worked under Mr. Holcomb. When the train that killed him passed that morning I was down below the bridge about 1,000 feet, towards Chattanooga. We were surfacing the track. We had done surfaced up the tracks going north. We timbered it and surfaced it and filled it up, all but lining it up. We filled it up with ballast. I saw Mr. Hughes as he passed the section gang that morning. He was standing on the front end of the engine, on that little platform just above the cow catcher. He was facing that bridge. He was on the fireman's side. The train was moving towards the bridge at that time. I saw him after that, I saw him after they got him out of the creek, out of the water. I had been engaged in that kind of work something like 8 years. There were no low joints between that dirt road crossing [fol. 134] and the bridge. There wasn't any churning of the water up and down between the ties.

Cross-examination:

I was one of the section gang. I work now for the Luke Bridge Construction Company. I testified on the last trial

of this case. I was working for the road at that time. Yes, sir, I saw Mr. Hughes on the front of the engine. I was working under Mr. Holcomb at the time. I was there in the gang, and Mr. Holcomb was there. Hughes was not looking down at the front of the engine when I saw him. Yes, I saw him when he passed. He was standing facing the bridge when I saw him, on the fireman's side; standing on the platform there, facing the way he was going. No, sir, he didn't have his head down that way looking at something under the engine when I saw him. Yes, sir, Mr. Holcomb and I were both there.

HENRY SELF, sworn for defendant, testified:

I work on the track with Mr. Holcomb; I am still with Mr. Holcomb's gang. I was with that gang the time Mr. Hughes was killed. When the train passed that Mr. Hughes was on we were about 1,000 feet north of the bridge. As to what we had been doing just before that on that part of the track about 1,000 feet from where we were down to the bridge—we were coming back there lining up. Before that we had put new timber in and re-ballasted and surfaced it up. I have worked for Mr. Holcomb there, I guess, about five years. I saw Mr. Hughes as he passed that morning. He was out on the front end of the engine up above the cow hooker. I didn't see him doing anything when he passed us, only he was smoking a cigarette. The next time I seen him they were getting him out of the creek. There were no low joints in that track between the dirt crossing and the bridge; none that I seen.

[fol. 135] Cross-examination:

Yes, sir, I still work for the road as section hand. Mr. Hughes was standing up above the boiler head, in front of it, right up over the cow hooker there, along here (marking), holding to that road; he was standing about the front end, you might say, the front end of the boiler. He was standing about the front end of the engine there (pointing with finger). He was looking at us when he passed. I was on the left hand side of the track towards the bridge;

that is the east side of the track. I was looking towards him when he passed and threw up his hand. I was about 1,000 feet from the bridge. The train was going, I expect, about 25 miles an hour. I never saw him any more after he passed me until they got him out of the creek; they were taking him out of the creek when I saw him. I didn't see him looking down at anything under the engine, I never saw anything like that.

V. A. Langston, sworn for defendant, testified:

I am re-sawyer at the Chattanooga Manufacturing Company. In April 1923, when Mr. Hughes was killed. I was working for Mr. W. A. Holcomb, one of his section gang. When the train passed coming from Chattanooga south I was at bridge 123.6—something like 800 or 1,000 feet north. Just before that we had been surfacing the track from the bridge back north to where we were at. Surfacing the track up; timbered it all the way around, put in new rocks and was going over it giving it a final surfacing. As the train passed the section gang I saw Mr. Hughes out on the running board of the engine on the left hand side. He was smoking a cigarette was all I seen him doing. The next time I saw him was after he was killed. When I saw him he was fronting towards the bridge. I never saw any low joint or low places between where we were working and that bridge at that time.

[fol. 136] Cross-examination:

Yes, sir, I said that I was in the section gang about 1,000 feet north of the bridge. I couldn't tell you how many there were in the gang. I was on the right hand side going north. We were all bunched there together, working there together. I wouldn't say that we were all within the space of this room, but we were within calling distance of each other. Mr. Hughes was smoking as he passed. I saw him when he waived. As to that running board extending from the cab over towards the front end of the engine—I suppose it goes all the way through, I never paid particular attention to it. He was on the front end,

the left hand side. He was right up here pointing). He was next to the pilot, on the front end of the side of the engine. I don't know how many steps you would have to take to get down on the cross bar there in front of the engine. He was up there above the steps; I don't know whether he intended to go down or not.

R. I. Scott, sworn for defendant, testified:

I haul sand and gravel—for myself. I live in Hamilton County, Tennessee. At the time Mr. Hughes was killed I lived near that No. 6 bridge there, about 100 yards northwest of it, on the hill, in that little house on the hill. I had been living there about 15 years. The business I was in at that time was hauling sand and gravel, the same that I am in now—for myself. There were two or three men working there at the time. I remember Amos Shepherd was hauling sand with a team that morning, at the time of the killing of Mr. Hughes. I had gone out with a load of sand but I was there early that morning. I noticed the track every day; couldn't keep from noticing it, because of that crossing, waiting for trucks to come over, and teams. The section gang was at work that morning about 200 or 300 yards north of there on the curve. They had [fol. 137] been working there a right smart while. They retimbered that track all through there and put new ballast in and surfaced it and I think they were just dressing up that morning on the last part of it finishing it up. As to the condition of that track, from what I know about railroading, it looked to me like it was in A-1 condition. I did not observe any low joints or low places between that little road that runs across there and the bridge. I don't know anything about where Amos Shepherd was at the time that train passed, only what he told me. He told me he was loading his wagon about 150 yards north—kind of northeast of there, out in the field when the train came by, throwing sand on his wagon. There is a driveway there that goes up to my house. There hasn't been any change in the direction of that road there since Mr. Hughes was killed but I filled it up there about eight inches with sand and gravel. I worked about three years on a track.

Cross-examination:

I was a witness in this case here before on a former trial. As to my having said, on one of the former trials, that the track was in better condition when Mr. Hughes was killed than it is now—it was absolutely new tracks at that time. Of course, the track don't stay good all the time but it gets older every day. No, sir, I did not state that I had noticed the track giving away when trains passed over it—not at the time. I never noticed anything out of the way no time. As to my saying that it would go down a little when a train passed over it—it might do that now. All railroads have to give some; if they didn't trains might turn over. As to my knowing Mr. Taylor, the claim agent of the railroad—I have met him a time or two, but as to helping him to prepare this case up there—not that anybody knows about—no, sir, I have not talked to the witnesses and tried to help to bring them [fol. 138] here. As to my coming down here freely—I don't know but what I had to come. Yes, I live in Tennessee. I have not worked for the railroad since I worked on the tracks. I worked for them about three years. I was not there at the time when this accident happened and never saw it. As to what there was between the place where Amos Shepherd told me he was and the corner of this bridge, there was a cut that runs up pretty close to the bridge. I don't know whether you could see the bridge from that place where he told me he was at that morning or not. I was there when Mr. Arnold and his party came up there to take some pictures. I did not see any ties that day where the water slushed up and down. The night before that photographing party was there we had a hard rain, as hard a rain that night as I ever saw in my life. I don't say it was cloudy that day but I know it rained awfully hard.

Cross-examination:

Yes, sir, there is a bank north of that bridge, I don't know exactly how far north, but it is about four rail lengths from the bridge, I guess—the edge of the bank. As to there being any difficulty in seeing that train when it was not behind the bank, the bank didn't extend out as far as

that. He was about 150 yards north of the bridge in the field. He couldn't see the train after it went in that little cut but he could see it before it went in there.

F. E. Scott, sworn for defendant, testified:

I farm and do public hauling. I live near Chattanooga. In April 1923, at the time Mr. Hughes was killed, I was burning charcoal, farming and public hauling. At that time I lived near No. 6 railroad bridge in that little house on the hill. I had worked on the railroad track once before as section hand, about six years. Shortly before Mr. Hughes was killed I know what work had been done be-
[fol. 139] tween bridge No. 123.6 for some 800 or 1,000 feet north; the track had been worked on. I had been down there that morning that Mr. Hughes was killed. That track had been new timbered and ballast put in and been generally overhauled. The condition of that track was good. I observed no low joints or low places between that road that come down from my house and the bridge.

Cross-examination:

I am a brother of the Mr. Scott who was just on the stand. I live in Tennessee. I was down at one trial before this. I have not been helping the railroad to look up witnesses; neither has my brother. I know he had not because he is not that kind of a man to be out looking up somebody else's evidence. Yes, sir. I worked for the railroad six or seven years. I don't know where Amos Shepard was working. I was in town, in Chattanooga, at the time of the accident and didn't know anything about that.

O. L. Scott, sworn for defendant, testified:

I am a carpenter. In April 1923, when Mr. Hughes was killed, I was screening sand for my brother, R. I. Scott, and I was living with him in that little house on the hill at the time that the accident happened. I have done track work—a little, for about six weeks. On the morning Mr.

Hughes was killed I was working in the bottom below the bridge, towards Chattanooga, and Amos Shepherd was loading sand close to where I was at. I suppose he was about 125 yards from that crossing where the road crosses the railroad. There wasn't anything between him and the bridge, but between him and the track there was a cut, a bank. I don't know myself that the section gang was working there on that track between the bridge—north of the bridge towards Chattanooga, but I heard they were; some of them said they were but I didn't see them work-[fol. 140] ing there. I had been working down in the bottom, but they had been working there before that.

Cross-examination:

I never measured the height of that cut that I was talking about, but I guess it is 10 or 15 feet high, above the railroad. This picture No. 9 shows the cut that I have been talking about. I don't know whether a man could see a train over that cut out there on that track or not; I never noticed about that. After it got through the cut there was no trouble about his seeing it. There wasn't anything there to keep him from seeing it before it got in the cut. I don't know how long that cut is, but somewhere about 100 feet. I don't know about seeing it a quarter of a mile before it got into that cut but you could see it some distance. After it got out of the cut, going towards the bridge, between the crossing and the bridge, he could see it if he looked closely. There are not any more Scotts up there. I reckon the railroad brought all three of us down here. There were two of us brothers living in that house at the time.

J. E. Ward, sworn for defendant, testified:

I farm, burn charcoal and truck around with a truck—haul. That was my business at the time Mr. Hughes was killed—about the same as it is now. I have not changed occupation. I live about one mile from the scene of the accident. At that time I lived at the same place; had been living there something like 23 years. Yes, sir, I had occasion to pass back and forth over that crossing which was

next to the railroad bridge there where Mr. Hughes was killed, recently before he was killed. The section gang had been working on that part of the track, resurfacing, putting ballast and putting in new rails.

[fol. 141] Defendant introduced, also, testimony of Edwin S. Humphries, delivered on a former trial of the case and allowed by agreement to be read in evidence on this trial, as follows:

I am contracting engineer of the Virginia Bridge & Iron Co. in Georgia of the Southeastern Territory, which includes South Carolina, Georgia and Florida.

My profession is that of civil engineer. I was educated at Washington & Lee University, Va. I graduated in 1910. I have been making a specialty of this bridge work ever since I left college, fifteen years.

In my position I have dealings with railroads as to railroad bridges, designing and supplying bridges for railroads, and it is necessary for me to familiarize myself with the standards of various railroads as to the construction and sizes of bridges and things like that.

This picture of the bridge identified as A-BBB over Chickamauga Creek, called a Through Truss Bridge, I know about bridges of that character, and the clearance.

The Standard Clearance as adopted by the American Railway Engineer's Association in 1910 was 14 feet. Different railroads have different ideas about the Clearance. Most of the railroads use the American Railway Engineer's Specifications. They were standardized in 1910 at 14 feet. In 1920, they were increased to 16 feet; however, there are still a number of railroads that don't use the 16-foot clearance. In fact my opinion is the majority of railroads do not use 16 feet and 14 feet is what I would say is the Standard Clearance.

Cross-examination:

I said in 1920, the American Railway Engineers' Association specifications called for 16 feet. There are a great many railroads that have their own ideas about the width and so on.

[fol. 142] THOMAS WALTERS, sworn for the defendant, testified:

I live on the Brandy Road near where Mr. Hughes was killed. In April, 1923, I lived at the south end of the bridge, on the Martin farm, I was farming there. I know that bridge and the crossing just north of it. I had occasion about that time to observe the condition of that track. It had been new timbered and ballasted by Mr. Holcomb and his hands.

R. L. SCHMIDT, sworn for defendant, testified:

I am assistant to the General Manager of the N. C. & St. L. Railroad, which includes the Western & Atlantic Line. In April, 1923, at the time Mr. Hughes was killed, I was Division Engineer of the W. & A. division of the N. C. & St. L.—the Western & Atlantic Railroad, extending from Chattanooga to Atlanta. My profession is that of civil engineer. I have been a civil engineer for about 20 years. I had been Division Engineer of the Western & Atlantic Railroad about three years before Mr. Hughes was killed. I have been in charge of engineering work for about 11 years. I know bridge 123.6 over Chickamauga Creek where Mr. Hughes was killed. The first time I passed over that bridge was in 1915. The last time I passed over it was two or three days from the time he was killed. I went over that road at that time about twice a week. It was about two about two or three days after Mr. Hughes was killed before I went over that track. I knew what the condition of the track was from the bridge for a considerable distance north, at that time. It had been overhauled. By that I mean new ballast put in, new cross ties put in, new track, resurfaced—that is, surfacing the top rails smooth, and put in good line—the general work of putting the track in good, first class condition. All of that process of overhauling had been completed except dressing it up for appearance sake [fol. 143] from the bridge to a point about 1,000 feet north of that. It was in first class condition. That bridge is a through truss bridge. There were six of those bridges there at that time on that division; five now; including that bridge there, from that point north to Chattanooga, four. The next truss bridge north of bridge 123.6 was about five

miles. That is over Chickamauga Creek. There are 13 bridges in all over Chickamauga Creek. Some of them were through truss bridges and the others were deck bridges. By deck bridge I mean, all the structure is below the plane of the ties and the rails. As to the difference between the deck bridge and the truss bridges, it is a question of providing sufficient water-way space beneath the bridge. Wherever there is room to build a deck bridge we put that structure beneath the rails and ties, the way we build that kind of a bridge. If there is not room for the water to pass under that kind of a bridge, we build a truss bridge. At bridge 123.6 there was not sufficient clearance. Prior to that time I had observed the rise of water under that bridge. In 1920, the first day I was in charge of the Atlanta division, we had high water and I saw water at bridge 123.6 striking the side of the bridge, striking up on the cross ties. The water was entirely filling that water-way. That particular bridge has been there since 1892. The width of it was 14 feet 2 inches. I am familiar with the standard types of bridges used by most first class railroads in the United States up to that time. The general width of those truss bridges was 14 feet. As to why we had to have different depths of beams at different places—the strength of a beam not only depends on the material from which it is made, but on its dimensions, particularly its depth. The deeper it is the stronger it is. The longer the span, the stronger the beam, and necessarily, therefore, the deeper the beams are. We had to build bridges of this particular [fol. 144] type at such places as this because you couldn't get sufficient depth of beam to put the beam beneath the rail and ties, and therefore you had to go up in the air to get the depth above the track. During my connection with the railroad I never heard of any person having been injured at that bridge, except Mr. Hughes since that bridge was built, in 1892, there has been a constant tendency to increase the size and weight of the engines, generally in length; some in height, very little in width. They were not increased in width because as railroads developed there were low structures——buildings, as well as bridges that had been built of a certain width that was necessary for the equipment, and if they were made a little wider they could not run on the railroad because of these structures that had been built. If they had been made wider it would have

been necessary to have expended tremendous sums of money, in fact, to rebuild the railroad. The average number of trains that were passing over that railroad about that time was between 25 and 30 each 24 hours.

Cross-examination:

The widest cabs that pass over there now are 10 feet 4 inches. Yes, Mr. Darden is the architect for engines and he would know better than I, and if he says the cabs are 10 feet 10, then he would be more apt to be right than I. As to the width of engines in 1892—I was about six years old. Of course I have seen old equipment, such as the General standing up in Chattanooga at the station, and I have read the history of railroads and things of that sort, but I could not undertake to give you the width of those engines. If Mr. Darden said they were 9 feet 4 inches. I would not dispute it. As to the width of the engines that run through that bridge at the time Mr. Hughes was killed, the width of the cab was 10 feet. Parts of the engine were wider than [fol. 145] the cab, down low where the cylinders are. The cylinders are a little wider than at the cab and that is where the 10 feet *feet* 10 comes in. As to the present width of that particular bridge, and as to changes made in it—it is just exactly as it was the day Hughes was killed.

J. A. Baldwin, sworn for defendant, testified:

I am superintendent of the division of the Western & Atlantic Railroad extending from Atlanta to Chattanooga. I was appointed superintendent in 1915. I have been in the railroad business 35 years; that is, on the Western & Atlantic. I was in railroad service before that. During my connection with the road I have never authorized a departure from the rule requiring employees not to go out on the engine when it is in motion. I have not been informed of any violation of that.

Cross-examination:

Rule 312 provides that employees are not required to pursue a dangerous practice in the preference of their duties or to use defective appliances even under the orders

of a superior, and every person accepting service agrees to see that the machinery, tools and appliances with which he is to work are in safe condition before using them. That is the rule that I refer to.

There was a rule issued when the L. & N. Railroad commenced using the tracks from Cartersville requiring engineers and firemen not to go out on the running board while the train was in motion, and then they had a habit of riding on the bumpers coming to certain switches, and I remember about this bulletin, but I don't remember when that was; it has been quite a while ago, though. I do not agree with you that the first bulletin issued was May 2, 1923, to engineers and firemen, calling their attention to instructions of long standing, that the men must not go out on the running board or front end or any other outside part of the engine [fol. 146] while in motion, as this is a very dangerous practice and should not be done under any circumstances. I say, that I do not agree with you that that was the first bulletin issued and I don't remember whether it was in that language or not. You see, there are so many of those various orders, as to their dates, I cannot keep them in my mind. I don't know how long they stay on the board, but almost indefinitely. I cannot answer as to whether this one stayed indefinitely or not. If that one is signed by the master mechanic, I did not issue that. No, I don't know of any thing in the rule book that mentions about the running board.

W. J. Porter, sworn for defendant, testified:

I am travelling engineer for the N. C. & St. L. I have held that position for about three years—July 1923, I believe it was—chief traveling engineer. Prior to that time I was travelling engineer, since 1918; before that time locomotive engineer, and before that fireman. I am familiar with the duties of a travelling fireman and with what they were in 1923, at the time Mr. Hughes was killed. Their primary duty was to instruct firemen, supervise the performance of firemen and supervise the consumption of fuel, the grade of fuel, and things of that kind. That was their principal duty at that time. They had nothing to do with the general operation of the engine. That was in charge

of the traveling engineer who operated the locomotive. I am familiar with the character of the report of the traveling engineers and firemen in 1923. They were the same reports we have used all the time. As to the handling of the engine, the throttle, reverse lever, etc., the traveling fireman would observe that inside of the cab. Also as to the condition of the fire—inside the cab; average scoops per [fol. 147] fire, inside the cab; times pop open—inside the cab; engine steaming—inside the cab. Under general conditions; gage cock—inside the cab; packing valves—they are on the front of the engine; an examination as to them would be made when the engine is standing still, because that is the only way in which he can determine, on the large power, similar to the engines we are using now, whether the packing is failing or not. As to the rods, the proper way to do that is when the engine is standing, because there are 12 rods on the large locomotives and it is difficult to tell, when the engine is running, which one of them it is. He should stop the engine and place it in a certain position, and reverse the engine, and he can tell exactly which one of the rods is binding. As to the fire box and fire door—inside the cab; holes in deck—inside the cab. As to the proper method of determining about front end air leaks—when the engine is standing you put the blower on, it is located in the front end underneath the stack; you put this blower on and the steam goes out of the stack and creates a vacuum in the front end and you apply your torch around the outside steam pipe and if it is leaking it will pull the blaze of the torch into the front end. You couldn't tell anything about it by putting your hand there. As to the temperature there, that would depend; a train in motion, going 25 miles an hour, it would be about 250 degrees inside the front end; of course it would not be so hot on the outside; it would be at least 250 degrees Fahrenheit, approximately. As to the quality of coal, that is determined from the deck of the engine inside; the whole front end of the tender is open there. As to the tender being loaded properly, you determine that from the ground. That means that the coal should not be piled up on the tender at such an angle that it would roll off while the engine is in motion. There were none of these requirements there in [fol. 148] the report that made it necessary for the travel-

ing fireman or traveling engineer to go out on the front while it was in motion. These big stoker engines of which 667 was one, were practically new engines. I think those engines were delivered along the first of the year 1923, but I can't say positively.

Cross-examination:

No, a fireman doesn't have to answer all of these things. He has to answer part of them. In fact, some of the traveling firemen do not fill out all of them. This man filled them all out. No, there is nothing in the blank that says that he must fill out some and not fill out others, but they had instructions, verbal instructions. As to written instructions to any of these men telling them that they must answer some of them and not answer others—I haven't any writing anywhere—not direct, but I have put it into writing indirectly. It is in the files in the office in Nashville. There are items on that report and it is supposed to be filled out and when they are sent to the office they are handled—we will say, for instance, with the engineer. If the traveling engineer is filling out that report and the main in imperfectly handling the engine, he calls attention to it at the time that he makes that report, and if we have another case of it, then I take it up with the engineer. As to the traveling fireman being supposed to make a report of everything required of him to answer, he has got instructions as to that; they have been told that it is not necessary to answer a part of them. As to changing that report and telling the fireman it is necessary to answer such and such a thing, and the engineer to answer such and such a thing—that would make a duplication of work. Yes, this one that has been handed to me has all of them answered. I did not reprimand Hughes for sending in answers to all [fol. 149] of the questions. I never took any action on his report. Yes, the fireman is vitally interested in the way the engine fires, and in the consumption of coal. No, the smoke stack is not the only way to tell how an engine is firing. Looking at how the smoke is coming out of the smoke stack is not the only way to tell whether an engine is firing correctly or not. Years ago, the more smoke he got out of the stack, the better fireman he was, but he

doesn't have to look at the smoke stack at all now; he looks at the fire and the steam gage. Yes, I know the master mechanic, but as to whether he would know how to fire an engine or how to tell the best results from firing or not—if he has never had any experience in firing, I doubt whether he would. We operate engines from Nashville to Chattanooga and there is never any smoke comes out. The stack is there to create a draft. We burn the smoke up. It does come out at times but that is not the proper way to tell how you are firing an engine. It does come out when the engine is not properly fired. We have got men who pay no attention to that, they just watch the fire and pay no attention to whether the smoke is coming out black or whether it is filling the whole stack. No, I have never told any of my firemen or engineers never to pay any attention to the smoke stack. It is true that the character of smoke coming out of the stack would indicate as to the feeding of the coal, the firing of the engine. If the smoke coming out was very dark it would indicate that coal was being wasted. It is also true that the color of the smoke has a good deal to do with the firing, showing the judgment of the fireman. The fireman knows that the lighter the smoke is the better the combustion is he gets. No, it is not true that if the smoke comes out of the stack all around it shows the evenness of the firing and indicates proper firing. It is true that the engineers on this road are promoted from [fol. 150] the position of firemen. Any man who is a fireman, whether a regular fireman or a traveling fireman, is in line for a promotion to engineer. No, sir, you don't have to be on the running board of an engine when it is in motion to see the smoke coming out of the smoke stack. You can see the smoke coming out of the stack from your cab. You can lean your head out and look through the front window and see that. No, you would not have to have a pretty long neck. Sitting on the fireman's seat in that engine you could see the smoke coming out right at the top of the stack, from the side of the stack next to you. The engineer can see a big portion of it on the right side, that is, the top of the stack, and the fireman could see a part of it—not all of it, but as to telling whether the smoke was filling the whole area or not, that is not the way to examine it. He

could see a fragment of the stack but could not see the other part, but that is not the instructions these men have to determine whether the stack is being filled or not. I saw Hughes time and again; I recommended his promotion. He was a pretty good sized man.

J. E. Countryman, sworn for defendant, testified:

At the present time I am assistant traveling engineer. At the time Mr. Hughes was killed in 1923, I was traveling fireman on the N. C. & St. L. Road, on the division between Chattanooga and Atlanta. I was appointed traveling fireman in 1918. I have been in the employ of the company since 1908. I was first employed as a fireman, and then I was made traveling fireman. The traveling fireman was supposed to improve the service of the fireman, conserving fuel and seeing that everything is carried on right on the locomotive; train new men and everything like that; instruct the fireman as to what he wants done. When he is out on the road he has nothing to do with the mechanical operation of the engine but his duties are to instruct the [fol. 151] fireman and sees that he fires the engine properly. He can best do that in the cab of the locomotive. He has no business out on the running board while the train is in motion, that I know of.

Cross-examination:

Yes, I testified before that I used frequently to go out on the running board of the small type of engine. I was a fireman at that time, at the time I was on the small type of engine. Yes, I testified that in order to see whether the engine is being fired properly or not you have to watch the smoke of the engine—on these small engines, the small type of engine. There is a whole lot of difference between the small type and the big type; you don't have to do that on the large type of engine. I don't remember whether I said on the other trial that I had to do that only on the small type of engine or not. Yes, I said I went out to see if the smoke was filling the whole stack and that I didn't have too much. No, they have not changed engines from the

little ones to the big ones since I swore last October, that I know of. I don't know why I didn't say that I was talking about the little engine then. They didn't ask me that that I know of. I might have said that as to all engines generally I watched the stack. The regular routine of promotion is from fireman to engineer. As to the best way to tell whether the engine is fired properly or not, you can see through the peep-holes in the stoker and see the color of the fire, and the steam gage. When you are watching the smoke you watch the stack. There is only one place for the smoke to come out, and that is the stack. That is where the smoke goes.

C. C. McHan, sworn for defendant, testified:

I am a brakeman for the N. C. & St. L., the Atlanta Division Atlanta to Chattanooga. In April, 1923, at the time [fol. 152] Mr. Hughes was killed, I was working as brakeman on the engine on which Mr. Hughes was killed, at the time he was killed. I was on the fireman's side, on the brakeman's side. Mr. Hughes got on that engine at Craven Yard about 13 or 14 miles from Chickamauga Station, and two or three miles from Chickamauga Station to this bridge where he was killed. From Craven, where Mr. Hughes got on, down to Chickamauga Station, he was firing the engine—instructing. It was a stoker fire engine; mechanically fired. The difference between that and the ordinary engine is that the ordinary engine is fired by hand, the coal is put in by hand. I didn't see Mr. Hughes get out on the running board. When I saw him he was going around the front of the engine on my side, which threw his side towards the bridge. If he were coming along that running board on the side, coming back towards me, it would throw his back towards the bridge. When I next saw him he was kind of stooping over looking at the cylinders down there and when I next saw him he was coming up those little steps on the running board, up towards the engine, towards me, facing me. When I last saw him before he fell he was about where the pumps usually are the air pumps of the engine; right along about there. When I saw him coming up those steps he was about as far from me as the corner of that table over there (in-

dicating); about 10 feet, or 20 feet, something like that. The engine at that time, I imagine, was about 10 or 15 cars out of the bridge, something like that. I said, as he was coming towards me, his back was towards the bridge. I looked back, I was looking back like this (illustrating), and the first thing I knew something brushed my goggles, some part of his body hit my shoulder, and I saw him then go down. No, sir, I didn't have my head out of the window looking; just kind of out of the gangway like that; head slightly out. When I felt something brush by me I saw his [fol. 153] body going down the bridge like that. The engine by that time had gotten through the bridge, just about the other side of the bridge; just inside. I turned then towards Mr. Price, our engineer, and told him to "Shoot them," which means to apply the air in emergency. I went back there after the train stopped but I did not help to get his body out of the creek. The engine, in entering the bridge, was running along smoothly. I did not notice it rocking any; I did not notice anything unusual about it rocking. I imagine the engine was going then about 25 or 30 miles an hour.

Cross-examination:

That road crossing there is, I imagine, about 40 or 50 feet from the bridge. As to my intentions in looking back at that time—we are required to look back to see if there is anything on the track to see if the train is all right. As I said, we were running about 25 or 30 miles an hour. I was brakeman, riding on the engine. I was inside of the cab; sitting on a little individual seat—front brakeman. As to my saying on the last trial that the last time I saw Mr. Hughes he was on the running board of the engine 15 or 20 feet from the cab—I said about as far as from here to that table; about 10 or 12 or 14 feet, something like that. I had first seen him going around the front of the engine. He was looking down at the cylinders, I imagine; I could see his head and face and eyes towards the cylinders. Yes, sir, after that he climbed up those steps at the front of the running board and got on the running board, and the last I saw of him he was about 10 or 12 feet from the cab. I don't know what hit him. I did not see him when he was hit. All

I knew was that he brushed by me finally as he fell. I couldn't say how he fell or where he fell. The last time I saw him he had his hand on that rail on the top of the boiler when he was walking on the running board.

[fol. 154] M. P. Massey, sworn for defendant, testified:

I live at Smyrna, Georgia, I am train dispatcher for the Western & Atlantic Railroad, and was on April 25, 1923. This package I have in my hand here is train sheet, the train dispatcher's sheet for April 25, 1923. I also have them here for the 28th. As to what freight trains passed Chickamauga bridge 123.6, between 1 o'clock in the afternoon and 6 o'clock in the afternoon—No. 45, engine 601, coming south. It left Chickamauga at 1 o'clock. No. 20, local freight train, left Graysville at 4 and arrived at Chickamauga at 4:17, going north. There were no other freight trains coming south between those points, between 1 o'clock and 6.

Cross-examination:

I say one freight train passed going south and one freight train passed going north. There was one northbound passenger train passed Chickamauga at 1 o'clock—No. 94, second 94 it was. It passed the bridge before 1 P. M. No. 1 left Chickamauga at 2:43 P. M. coming south, a passenger train. No. 95, the first section of the Dixie Flyer, passed Chickamauga at 3:27 P. M. Second No. 95 passed Chickamauga at 3:53 P. M., a passenger train, southbound; No. 1, first and second southbound. There were five trains, going in both directions, in that time, and two going south—four going south; one of them coming south was a freight and three of them passengers, and one of them going north was a freight. As to the time this freight train coming south passed this bridge—bridge 123.6—this freight train leaves Chickamauga, by the time it pulled out of the siding, it passed there somewhere around 1:06 or 1:08.

M. S. Ransom, sworn for defendant, testified:

I am master mechanic for the N. C. & St. L. road, Atlanta division—the Western & Atlantic, between Atlanta and [fol. 155] Chattanooga. In April, 1923, I held the position of master mechanic, the same as I have now. I have held that position since 1914. Before that I was round house foreman. I have been in the service of this road 35 years. I knew Mr. Hughes. At the time he was killed he was traveling fireman. The traveling fireman reports directly to the chief travelling engineer at the present time, and on the division they reported to the master mechanic also. The duties of the traveling fireman were to instruct the fireman in conserving fuel, the proper method of firing, taking care of the fire box and locomotive, seeing that the new men were instructed in the rules and understood the rules after he had instructed them with reference to firing a locomotive, and their duties as firemen, and to report to the master mechanic of the division such defects or troubles that might arise and effect the conserving of fuel on the locomotive. I think it was in 1910 that Mr. Hughes entered the service of the Western & Atlantic Railroad. He had been traveling fireman for about 20 days, or something like that—20 or 25 days. This type of engine, 667, came into use on the Western & Atlantic Railroad about the first of the month; purchased about the first of the year. The difference of the width of engine 667 and other freight engines which had been used on the road prior to the death of Mr. Hughes—the 600's, 624's, 630's, that class, was two inches; the L one class were two inches wider than this class engine at the cab. The width of the L one class was 10 feet 4 at the cab, and of this class 667, 10 feet 2. The length of this engine 667 from coupler to coupler was about 83 feet or a little more; the height from the top of the rail to the top of the smoke stack was 15 feet and something; I don't know the exact figures, but 15 feet 2 is given here. The height of the engine—of the cab of the engine, was 12 feet 1-½ inches; that is the eave, the extreme top of the car; that [fol. 156] goes up, approximately—the figure is not given, but it would be about 14 inches. The boiler in that type of engine sets low in the frame, as we call it. The fire box sets back here to the rear of the driver and they carry what

is called a controller that takes care of that fire box; that admits of the engine being set much lower in the driver on the frame of the locomotive. The purpose of that is to take away that top-heavy condition that would effect the movement of the engine under such conditions. That has a tendency to considerably decrease the rocking effect. The engineer has to look after the mechanical operation of the engine on the road. When Mr. Hughes was appointed traveling fireman he reported for instructions to me and I instructed him in the general line of his duty towards the firemen—the duties of a fireman, the rules of safety, etc., and particularly as to his own welfare; to keep off of the running board or other things on the outside of the cab when the locomotive is under motion. I did that because of the fact we had had an unfortunate accident to a young man some time before that, by his being out on the front end of the engine and falling off and losing his foot—a young fireman named Bell. The point from which to best observe the condition and way in which fuel is being consumed is in the cab. That is because in the cab you get a view of the pressure the boiler is carrying, whether it fluctuates or not; that indicates whether the condition of the fire is solid and good or is getting too much air. On the other hand you have got the peep holes in the modern engine stoker to see the fire, and in the next place, if that is your purpose, on the engine, you can stand and look and see the smoke and tell whether you are consuming the fuel properly or not. I say he could observe the condition of the fire through the peep holes of the stoker, the fluctuating pressure on the gage, which would indicate the condition of the fire, whether it was getting too [fol. 157] much air or not, and through the window, if he was standing up, which he would be ordinarily, if he was a traveling fireman, he could observe the smoke and tell its color from the stack. He could observe the condition of the smoke coming out of the stack if he was out on the running board, but he would have to hold on, of course, and he would not have the freedom of action that he would have in the cab. In determining how much steam you were making, you would look on the gage in the cab. The only way to definitely determine as to the knocking of the rods and to identify the particular rods, is when the engine is standing

at rest, to place it on what we call a car, and give it steam from the throttle, using the reverse lever back and forth, giving different motion. As to the valve packing in the steam chest, the only definite way to tell is when the engine is at rest, to place the engine on a test center and give it a small amount of steam with the brake pulling, moving the lever slightly. The proper method to determine the air leaks is when the engine is at rest to turn the blower on, and that is the instructions, and use a torch. The blower forms a partial vacuum in the front end and you use the torch around over the joint where the blaze leaks in, and determine just the place where the leak is. You couldn't do that by putting your hand there while the engine is in motion; you would get burned. It is between 400 and 500 degrees temperature, and to put your ear close enough to listen it would burn you. Mr. Hughes, as traveling fireman, had no duty to perform that required him to go out on the running board while the train was in motion; neither has the traveling engineer. As to reports that have been made to me before Mr. Hughes' death, of any violation of instructions by the traveling firemen about not going out on the running board when the train is in motion—the traveling engineer reported to me the fact that he laid down on the [fol. 158] running board to oil the engine, and I handled it as a violation. There were no other reports—not at that particular time. That was just a short time before Mr. Hughes was made traveling fireman. There was a bulletin—instructions with reference to the employees going out on the running board while the train was in motion; the first bulletin was issued some time back, I think, in 1908. It was issued by a former mechanic. I was round-house foreman at the time. Before Mr. Hughes' death the bulletin was repeated. That bulletin was in existence at the time Mr. Hughes was running as fireman. We have a bulletin board, a small blackboard, and these bulletins are placed on there with four tacks. They stay on there from 30 to 60 days. If they should wear off or blow off that does not withdraw or affect the bulletin. I am reasonably familiar with locomotive engines and their movement along the track. I have ridden lots of them. I have never run one only for practice. The effect on an engine running along, if the track

should give away on one side with the engine on it from four to five inches and some 30 or 40 feet further on on the other side should give away from four to five inches, just before entering a bridge, that bridge would have to be pretty wide if you got through it. Only a miracle would keep it from being derailed.

Cross-examination:

I am not an engineer; I am a master mechanic. I have men under me. Whatever running I have done with an engine I have done only for practice out on the road, for experimental purposes. Yes, engines do leak, and you do have some rocking motion. Yes, sir, I have seen an engine approaching a bridge that there was not some rocking to. An engine taking a grade does not rock, but on a straight cut there is more or less of it. It is impossible to have a road bed that is absolutely solid. Yes, the rougher the track the more it is liable to rock. As to there being a [fol. 159] great deal more rocking on these rough side tracks that are not as well ballasted as the main line, if you get up the same speed they will, but the speed is very low. There is a principle on which you can figure, if a car body is let down one, two or three inches, as to how much that would project over. The rule is about three to one; that is my recollection of it. Yes, the effort in making these vehicles is to try to overcome that as much as possible. No, you would not want a track with a low joint in it. Yes, I testified in this case before that one of the main features in determining whether you are getting good results from your firing or not was to look out at the smoke stack and if the smoke comes out full, fills the whole opening in the stack, that that is a sign that it is being well done. If the smoke comes out flat you might say there was something the matter somewhere. If the smoke is too heavy it shows you are wasting fuel. The better firing you get the lighter the smoke is. Yes, the smoke stack is a considerable factor in determining as to the firing but you don't have to see the stack, you understand, to determine it. The written rules are in this black book. No, there is not a word in that particular section about not going out on the running board;

I don't see anything about the running board. Yes, we also had some special instructions on a time card; I have seen one of those time cards. No, there is nothing about the running board in there. No, the only writing I have ever seen about the running board is not the one of May 2nd, 1923, addressed to engineers and firemen; I saw one previous to this. I can't say that it was exactly word for word like this but that is a practical copy of the other one. My recollection is that was back about 1908, or somewhere along there. I was then a round house foreman. No, I never saw one after that until this one was written after Hughes' [fol. 160] death. I said that these things stayed on the board about 30 to 60 days, or something like that, and they were then taken down. I had a talk with Mr. Hughes when he was made traveling fireman. No, I did not know that he was going to be called on to go out on the running board. I talked to him about going out on the engine—any part of it, while in motion, and related to him the circumstances of a traveling engineer, a short time before that, reported for lying down on the running board to oil the engine. No, he didn't get hurt. The only point of danger that I talked to him about was not just the running board; I talked to him about going out on the engine at all. Yes, sir, to get to the front end of the engine, in motion, he would have to go on the running board. My warning to him about not going out was anywhere on the engine, not so particularly the running board. No, it is not any special fun riding out there on the front end and it is not as comfortable as the cab. As to what I was doing when I rode out there—I was watching the mechanical engineer; testing. It was running, I guess, 35 miles an hour. As I have stated, I talked to him about the rules of safety and cautioned him to particularly supervise the young firemen and those he had training with reference to those matters, regarding all those things. I could not repeat the words that I used to this young man. Yes, he had been a fireman a long time. You see, we were employing firemen all the time and he was to supervise the firemen we were employing. No, I did not warn the men under this man who did the traveling, about all of these dangers; that is up to them, the traveling firemen and traveling engineers to look after that. No, we hadn't any written book of instructions for these men, or

any written bulletins of any kind or memoranda to them; we just do that verbally. I am not sure as to who was there when [fol. 161] I had the talk with this man. No, there was not any other fellow being warned at the same time about this situation of the running board, no other traveling fireman on this division at that time. As to taking the running board off of this engine—we have to use them for repair purposes. Yes, we have a rod up on the side of the engine for the fellows to hold to and there are steps coming down from the end of it to the front of the engine made for human feet and human legs to go up and down. There is a place you can walk across the front of the engine and there are steps going up on the other side. No, there is no sign up there "Keep off when in motion," but we instruct the men to keep off. What I warned him about was allowing firemen, especially these young firemen who were learning to fire, apprenticeship—allowing them to ride out on the engine or to ride anywhere but in the cab, to keep their bodies well in the windows and not allow them to go under the engine. He was to look after these firemen; and then I warned him particularly, "Don't you go out on these engines in motion—on the running board, or any other part of them." That was the warning I gave him. No, I did not give any warning besides that to any other individuals. There is a hand rail around the cab that a man can use in getting out of the window of a cab and getting around the gangway or about this running board. As to something to put his foot on there is nothing down there but the base of the cab which is only about an inch and a half, varied from an inch and a half to two inches. Yes, it is sufficient to put the foot on. He can get inside of the window by holding on. Yes, that lever contrivance there is made for him to get around the engine on foot; shop men. No, there is nothing in the book there that shows that it is for shop men. As to my knowing that engineers and firemen, ever since I have been on the road, have been in the habit of going out on the running board when ever they [fol. 162] wanted to—I am sorry to say that some of them do, but I do not know that under the instructions we expect them to do it. Under no conditions do we want them to go out on the running board. When the engine is at rest he is supposed to go out there, if necessary. Yes, if the engine

is at rest he can climb up on a ladder. If he goes down to the front of an engine, if he is on the ground at the stack and wants to find out if he has sufficient sand in his box, he is going to put the ladder up on the running board to put the sand box on the running board, that is what it is for—for shop men. Yes, some things get out of condition on the road but not a great many. I can't recall a case where the sand box ever got out of fix, but the sand in the said box, when it is getting down to where he has got to go and knock the sand, he is down to two or three miles an hour. No, I am not always there to see whether or not he is down to two or three miles an hour, but that is the reason he is up there knocking sand. Yes, I recall a fireman by the name of Bell; he was a Southern road engineer. As I say, the first original bulletin was issued by the former master mechanic where a fireman got his foot cut off—a fireman by the name of Bell, and that bulletin had been out of date for some time, I guess; that is, I mean it had been off of the board, and I reissued the bulletin; I issued that bulletin myself. That bulletin issued by the former master mechanic was before 1908, the Bell bulletin. That has been taken off of the board but it is not gone, it is in some of the files, I reckon. I have not got it here. That bulletin, of course, was removed from the board. I say I think I issued that bulletin myself, after the accident, covering the previous bulletin. No, I could not give you that bulletin or give you within two years of the date of the bulletin—It would be guess. It was some years ago. That probably did not stay [fol. 163] on the board longer than 60 days. No, I haven't got either of them. The only thing, unfortunately, that we ever get good out of an accident is the lesson that it may be to someone else. Yes, the only bulletin that I can put my hand on now is the one after this accident.

E. M. Price, sworn for defendant, testified:

I am a locomotive engineer on the N. C. & St. L. Railroad, running from Atlanta to Chattanooga. I have been a locomotive engineer about 20 years and 10 months. Before I was a locomotive engineer I was fireman. I have been running as locomotive engineer between Atlanta and Chatta-

nooga 20 years and about 10 months. I was running engine 667 when Mr. Hughes was killed. I had known Mr. Hughes about 11 years I think it was. He had traveled over the road with me before. Mr. Hughes got on my engine that morning at the coal shutes at Craven Yard, Chattanooga. That was a large latest class of engine just come over on this division. I got down to this bridge 123.6, where he was killed, about 9:30. As to whether this engine 667 was wider or narrower than these other engines that had been previously commonly used on the road, I don't know; I never have measured them and I am not able to say, but we had another class of engine there before that about the same size, or the same width, of this engine; but, of course, I don't know, I never did measure them. My engine was running good that morning. It was a new engine. I had had no difficulties at all in the way of steam or firing; nothing the matter with the side rods or steam packing. Yes, I know when Mr. Hughes went out on the running board. No, I don't think he was subject to me; he was traveling fireman. He fired the engine from Craven to Chickamauga, and as we left Chickamauga he turned the stoker over to the regular fireman for him to fire the engine. [fol. 164] After we left Chickamauga Mr. Hughes was down on the deck of the engine just in front. The next thing I knew about his movements, the flap of his overalls hit me as he passed my window, on the outside of the cab, and he went out on the running board of the engine. He went out the gang-way. He went down on the front end of the engine and was standing there and passed out of my sight at the front end of the engine. He traveled on the running board to get to that point. That was before we got to this bridge. I did not see him any more until he was killed. In driving over that track in approaching that bridge, I did not observe anything as to the condition of the track. As to whether I would have noticed or not from the motion of the engine if that track, just south of the little road crossing there before we get to that bridge had a low place or low joint that would go down, say, four or five inches as the engine went over it, and then on the other side of the track some 20 or 30 feet further on there was another low place or low joint which would go down four

or five inches—just one low joint that way, one at a time, I wouldn't notice, but if it was the length of the engine then I would notice it. I did not notice any swaying of the engine on approaching or entering that bridge. The first thing I knew that morning of the emergency there was when my fireman motioned for me to stop; he said he had killed Mr. Hughes. I don't know how far that cruve is from the north end of the bridge. When Mr. Hughes went out on the running board we were going about 20 miles an hour. When we got to the crossing we were going between 25 and 30 miles an hour. I do not know what the exact clearance of that engine was on that bridge. As to whether, when the engine was going through that brige, there was clearance enough between the cab and the upright pieces sufficient to allow a man to go around the cab—[fol. 165] it would be close for him to get around there. The conductor that morning was Mr. Johnson and Mr. C. M. King was brakeman; he was back on the caboose. I think we had 45 cars.

Cross-examination:

I was sitting in my seat on the engineer's side and I felt him brush by me. He went out to the gang-way. There is a hand rail provided up there for a man to catch hold of. Yes, there was a kind of ledge around the cab about like around this jury box—about two inches. He went out about the sand box and stopped. He watched the stack, watched everything it looked like, looking down at the machinery right under him. I saw him watching the smoke. I did not see him look down under the front. When I saw him looking at the smoke and looking at the machinery he looked down and looked up and all around. As to whether he had his face in the direction of the smoke stack or not when he looked up—he might have, or he might have been looking at the sand box or something like that. There is a sand box there. No pump on that side; the air pump is on the other side, the left side. Yes, the packing is all in front; that is used a good deal. I have had traveling firemen before to go out on the running board of my engine. That was before Mr. Hughes went out; they had gone there on a number of occasions. Yes, this man

was traveling fireman. I paid no further attention to him after he got out of my sight; he disappeared around the other end of the engine. No, sitting in my engine I can't see the top of the smoke stack, that is hidden from me while in the cab by the sand box. The same thing is true from the fireman's side. In passing through that bridge I never have stopped in the bridge, and I never did measure how close the side pieces of the bridge came to the cab, but it is about three feet. No, I wouldn't swear as to that as I never measured it. No, sir, there were no knocks in [fol. 166] my engine on leaving Craven. I do not remember talking to Mrs. Hughes on Monday after the Wednesday on which Mr. Hughes was killed; it was later during the week. I went to her house and had a talk with her. Her sister was with her. Mrs. Hughes asked me how Mr. Hughes got killed and told her he went out on the front of the engine and was knocked off by the bridge. I did not tell her that I had a knock in my engine on leaving Craven and that I supposed that was the reason he was out there. My conductor is dead but the brakeman, King, is out there in the witness room, or was a few minutes ago.

Mrs. Nora E. Hughes, plaintiff, recalled, testified:

I had a talk with Mr. Price, the engineer, after my husband's death. That was on Monday evening after he was buried on Friday. He came out to the house to bring Mr. Hughes' clothes home; he brought them in a suitcase, and I was sitting at the table crying when he came in, and we commenced talking and he said, "Mrs. Hughes, Mr. Hughes fired out of Craven to Chickamauga, and at Chickamauga he went over to the regular fireman's side and said 'I fire this engine no more; I am traveling fireman' "; and he said while the engine was running slow leaving Chickamauga he felt something brush against his arm and he said he looked and it was Mr. Hughes going out on the engine, and then I said to Mr. Price, "How came Mr. Hughes to go out on the engine?" and he said, "On leaving Craven there was a knock in the engine and I reckon he went out to see about that." That is the sum and substance of what he said.

Mrs. Josie Hichols, sworn for plaintiff, testified:

Mrs. Hughes is my sister. I was at her house on Monday after the death of Mr. Hughes on Wednesday when Mr. Price, the engineer, came there and had a conversation with Mrs. Hughes. He said Mr. Hughes fired from Craven. [fol. 167] He said that he had a meet order there and on leaving Craven he told the fireman, "You take charge of this; I fire this no more; I am traveling fireman", so he took charge of it, and then he felt some thing brush his arm and he looked around to see what it was. He said the last he saw of him was on the end of the engine looking at the smoke stack. She said, "Mr. Price, how come Ira to go out on the engine?" and he says, "There was a knocking in the engine on leaving Craven."

Cross-examination:

Yes, sir, he said there was a knocking in the engine on leaving Craven. He said he had a meet order there, to side track at Chickamauga.

Offers in Evidence

Documentary Evidence

Plaintiff introduced Reports made by I. L. Hughes, traveling Fireman, ten in number, and dated, respectively, April 9, 10, 11, 13, 14, 16, 16, 18, 21, and 22, 1923.

The first of these reports, that is the report dated April 9, 1923, was as follows:

"Traveling Engineer and Fireman's Engine Report

Div.: Atlanta; Eng. No.: 666; Train No.: 43.
Date: 4-9, 23.
From Cravens to Hills Park. Miles: 136.
Engineer: T. L. Hamby. Fireman: J. A. Webb.

Handling of engine:

Throttle full; Rev. Lever Short; Braking Good.
Boiler Feeding good; Lubrication good.

Condition of fire: Good. Ave. Scoops per fire Stoker.
Times Pop Open: 6 Times. Rake use: None.
Eng. Steaming: Good.

General condition:

Gauge Cock good. Cyl. Packing good. Valves good. Rods good. Boxes good. Flues good. Arch good. Stoker good. Fire Box good. Fire Door good. Grate Shaker good. Holes in Dec: None. Front End Air [fol. 168] Leaks: None. Quality Coal: Fair. Tender Loaded Properly: Yes.

Remarks:——.

I. L. HUGHES, T. F."

One of said reports, that of April 11, 1923, showed the following:

Handling of engine:

Throttle full. Rev. Lever short. Baking good. Boiler Feeding good. Lubrication fine. Condition of fire: Good. Avg. Scoops per fire Stoker. Times Pop Opened: 8 Times. Rake Used once. Eng. Steaming good.

General condition:

Gauge Cock good. Cyl. Packing good. Valves good. Rods good. Boxes good. Flues good. Arch good. Stoker good. Fire Box good. Fire Door good. Grate Shaker good. Holes in Dec: None. Front End Air Leaks: None. Quality Coal: Fair. Tender Loaded Properly: It was.

Remarks: ——.

I. L. Hughes, T. F.

One of said reports, that of April 14, 1923, was of trip from Hills Park to Adairsville.

Another, that of April 21, 1923, was of trip from Hills Park to Ringgold.

Another, that of April 22, 1923, was of trip from Ringgold to Atlanta.

The remainder of the reports were of trips from Hills Park to Cravens, Cravens to Hills Park or Chattanooga to Atlanta.

These reports were all on similar printed forms, the printed portions being indicated by the words beginning [fol. 169] with Capital letters.

Under the head "Remarks" the reports were left in blank, except in the report of April 13, 1923 is the Remark: "Ash pan disconnected"; in that of April 14, 1923 is a report damage done by a collision to Engine 665; in that of April 16, 1923 is the Remark: "Wash out Plug in boiler leg leaking lubricator needs cleaning"; in that of April 16, 1923 is the remark: "reported slack taken up between Eng. & Tank;" in that of April 18, 1923 is the remark: "pack left piston both left cylinder cocks leaking steam;" and in that of April 22, 1923 is the Remark: "Mud rim leaking."

Plaintiff introduced, also, the Carlisle Mortality table, as printed on page 845 of the 70 Georgia Supreme Court Reports.

The only portions of the same material to be here set forth are: Age 34. (that of Ira L. Hughes) Expectation Years 31,68; age 32 (that of plaintiff) Expectation Years 33.03; age 9 (that of son of Mr. & Mrs. Hughes) Expectation 49.57.

Also the following photographs:

(Here follow photographs, marked side folio pages 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, and 182)

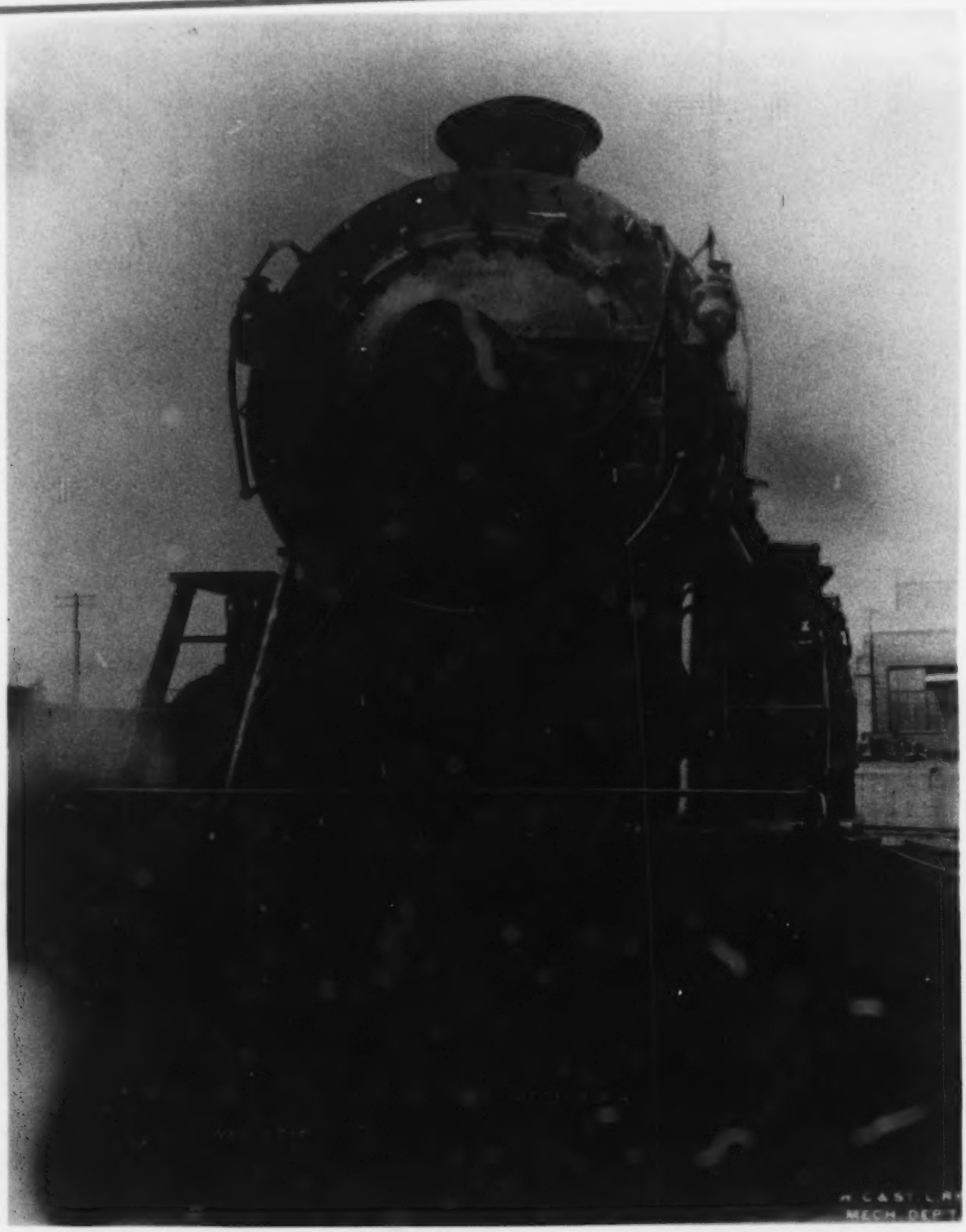
[fol. 183] OFFERS IN EVIDENCE

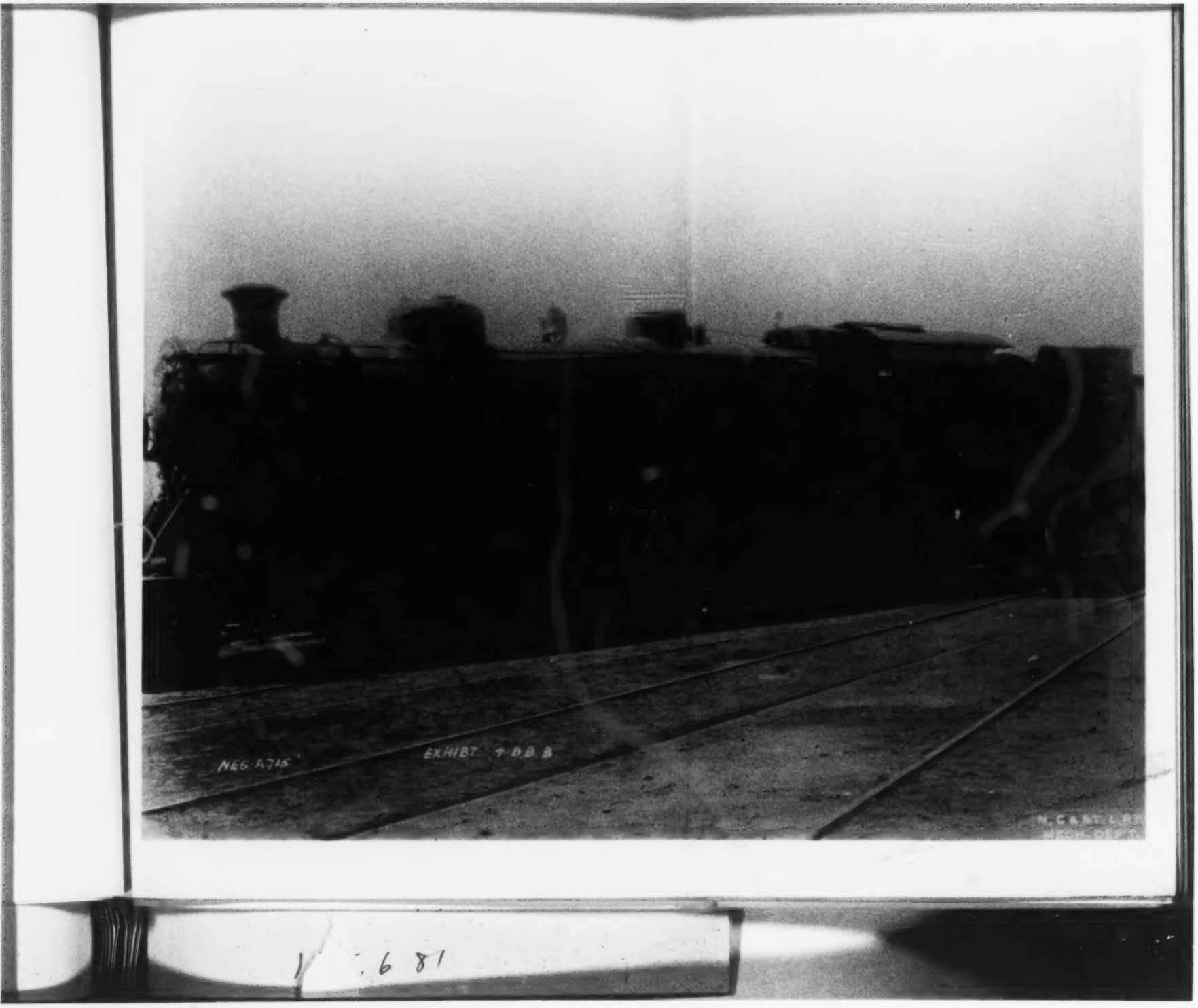
Defendant introduced Rule 321 of the Rules governing its Operating Department, as follows:

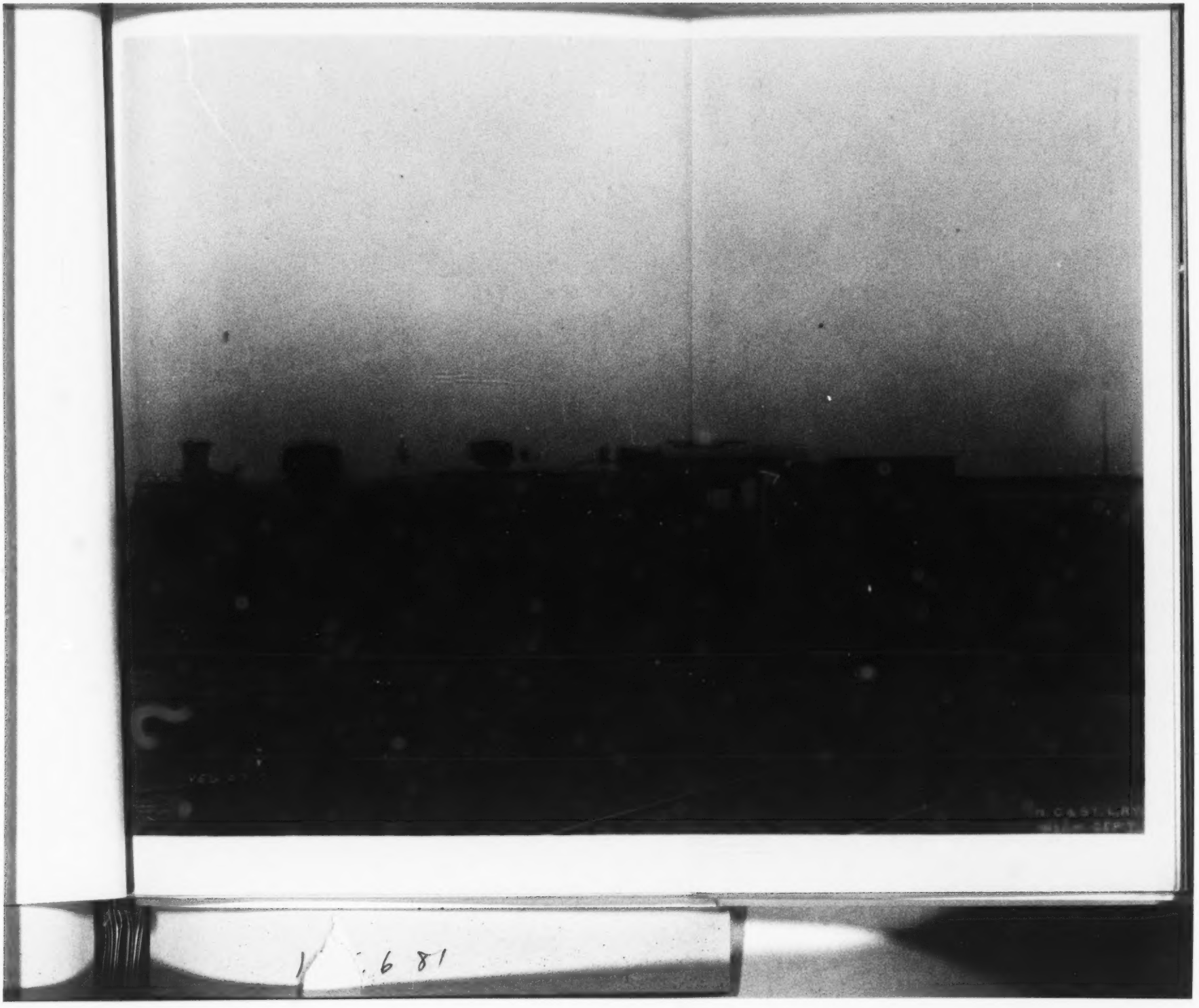
"Employees must inform themselves respecting the location of tunnels, bridges, buildings, stock yards, switches, overhead wires or other obstructions or structures along the line which will not clear them when on the top or sides of cars. They are cautioned against standing on cars while passing under bridges."

1 .6 81

Edwards & Son


MECH. DEPT


NEG. A-715
EXHIBIT "B.B.B."



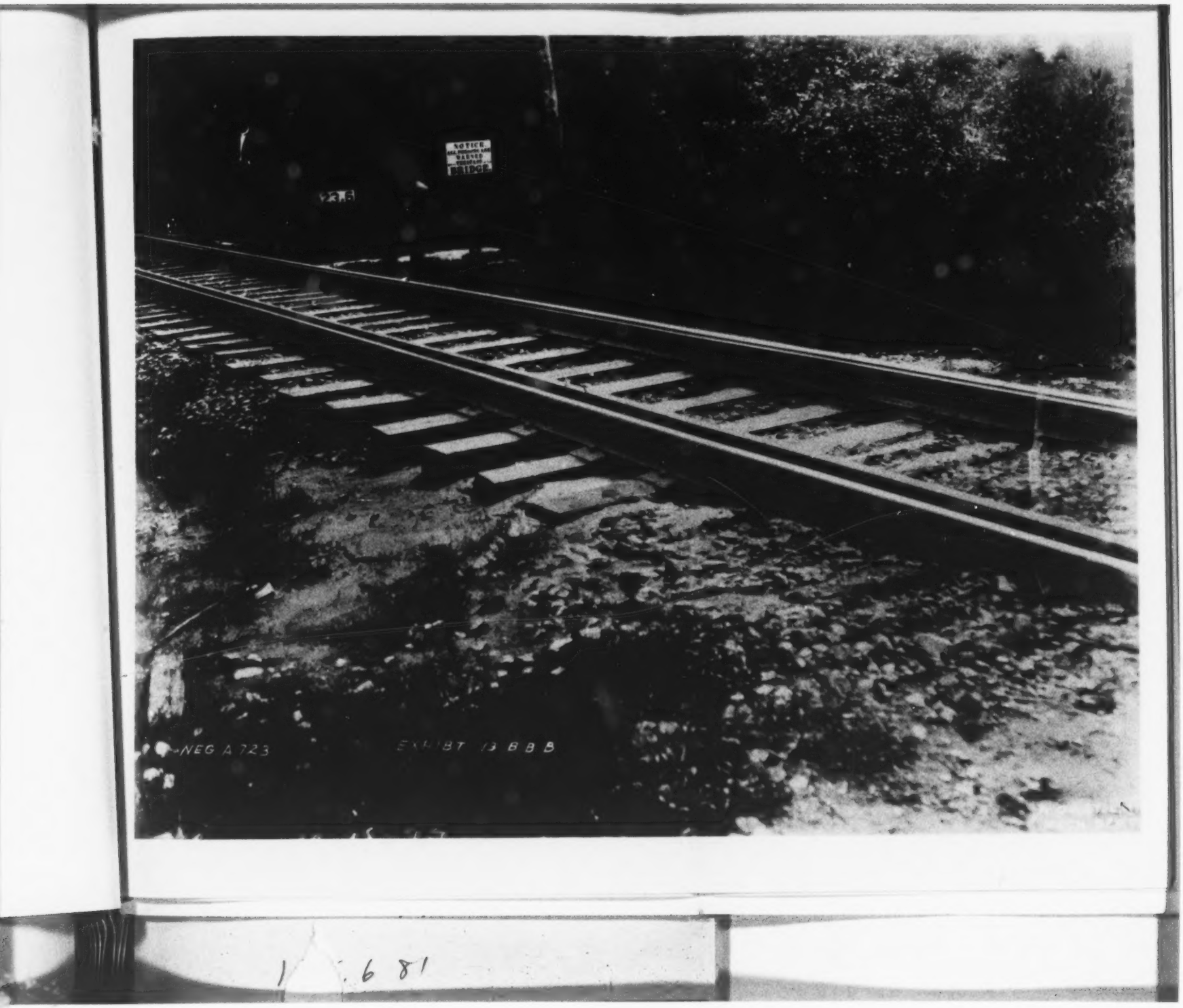
1 .681

1 .6 81

N. C. & ST. L. R.
MECH. DEPT.

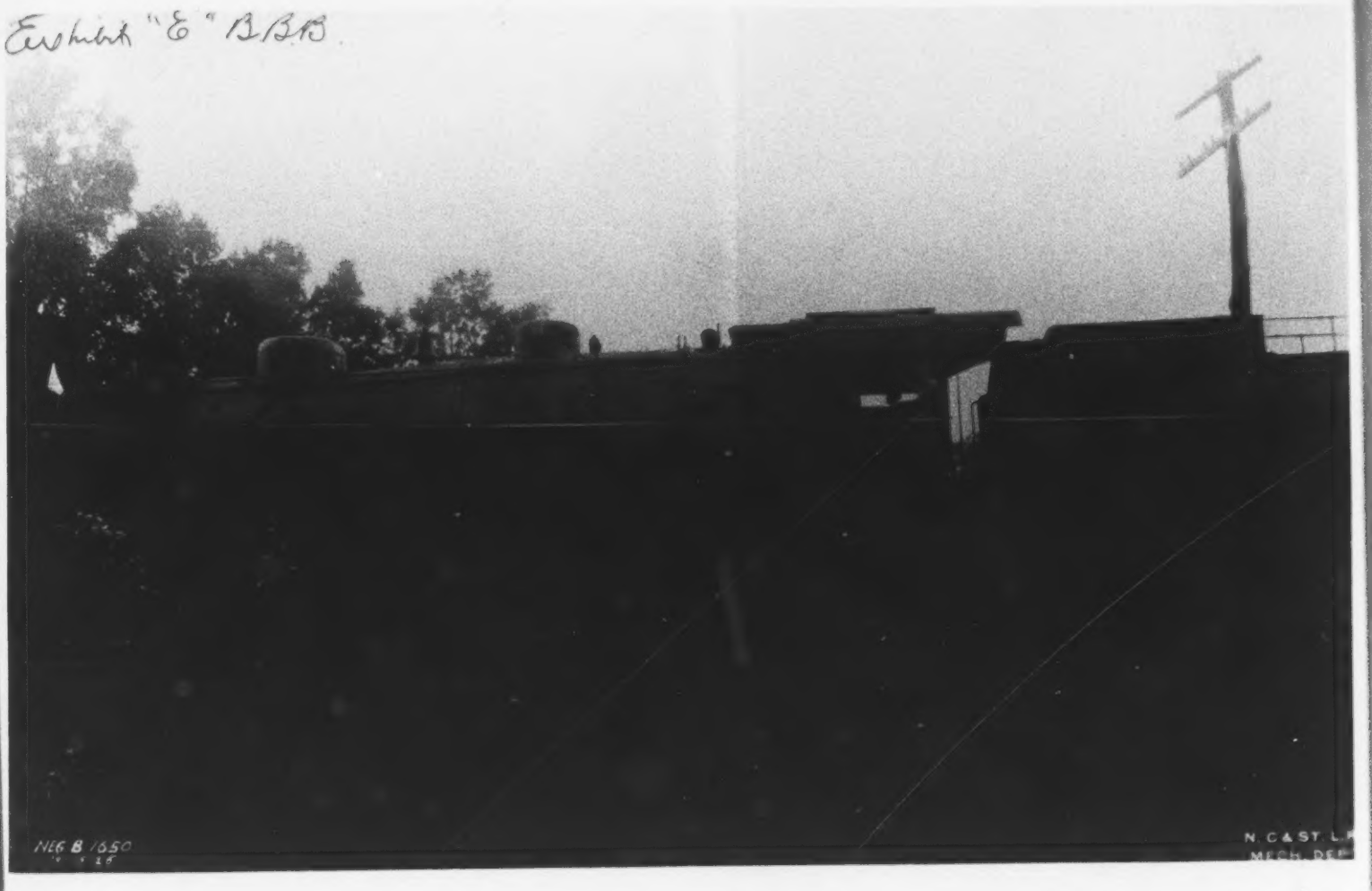
1 681

1 .6 81



1 .6 81

Exhibit "E" BBB



1 .6 81

NEG. A.705
10-18-25
N. C & ST. L. RY.
MECH. DEPT.

1891
NEG A. 706
BRIDGE 123.6
N. CASTELLAN

NEG A 707
N.C.& ST. L. RY.
MECH. DEPT.

N.C.&ST.L.RY.
NEG. A.708 BRIDGE 123.6 ENG. 667
1 .6 81

Also Rule 312 of the same Rules, as follows:

"Employees or not required or expected to pursue a dangerous practice in the performance of their duties, or to use defective appliances, even under the orders of an immediate superior; and every person accepting service agrees to see that the machinery, tools and appliances with which he is to work are in a safe condition before using them."

Also, the Carlisle Annuity Table, as printed on p. 847 of Vol. 70 of the Reports of the Supreme Court of Georgia, as follows:

1 .6 81

[fol. 184] Table Showing the Value of Annuities on Single Lives According to the Carlisle Table of Mortality

Page 847, 70 Ga. Reports

Age	6 per ct.	7 per ct.	Age	6 per ct.	7 per ct.	Age	6 per ct.	7 per ct.	Age	6 per ct.	7 per ct.
0	10 439	9 177									
1	12 078	10 605	27	13 275	11 832	53	9 988	9 205	79	4 040	3 883
2	12 925	11 342	28	13 181	11 759	54	9 761	9 011	80	3 858	3 713
3	13 652	11 978	29	13 096	11 693	55	9 524	8 807	81	3 556	3 523
4	14 325	12 322	30	13 020	11 636	56	9 280	8 595	82	3 474	3 352
5	14 325	12 574	31	12 924	11 578	57	9 027	8 375	83	3 286	3 174
6	14 460	12 698	32	12 860	11 516	58	8 772	8 135	84	3 102	2 999
7	14 518	12 756	33	12 771	11 448	59	8 529	7 940	85	2 909	2 815
8	14 526	12 770	34	12 675	11 374	60	8 304	7 743	86	2 739	2 652
9	14 500	12 754	35	12 573	11 295	61	8 108	7 272	87	2 599	2 519
10	14 448	12 717	36	12 465	11 211	62	7 913	7 403	88	2 515	2 439
11	14 384	12 669	37	12 354	11 124	63	7 714	7 229	89	2 417	2 344
12	14 321	12 621	38	12 239	11 033	64	7 502	7 042	90	2 266	2 198
13	14 257	12 572	39	12 120	10 939	65	7 281	6 847	91	2 248	2 180
14	14 191	12 522	40	12 002	10 845	66	7 049	6 641	92	2 337	2 266
15	14 126	12 473	41	11 890	10 757	67	6 803	6 421	93	2 440	2 376
16	14 067	12 429	42	11 779	10 671	68	6 546	6 189	94	2 492	2 419

17...	14 012	12 389	43...	11 668	10 585	69...	6 277	5 945	95...	2 522	2 451
18...	13 956	12 348	44...	11 551	10 494	70...	5 998	5 690	96...	2 486	2 420
19...	13 879	12 305	45...	11 428	10 397	71...	5 704	5 420	97...	2 368	2 309
20...	13 835	12 259	46...	11 296	10 292	72...	5 421	5 162	98...	2 227	2 177
21...	13 769	12 210	47...	11 154	10 178	73...	5 170	4 927	99...	2 004	1 964
22...	13 697	12 156	48...	10 998	10 052	74...	4 944	4 719	100...	1 598	1 569
23...	13 621	12 098	49...	10 823	9 908	75...	4 760	4 549	101...	1 175	1 159
24...	13 541	12 037	50...	10 631	9 749	76...	4 579	4 382	102...	0 744	0 735
25...	13 456	11 972	51...	10 422	9 573	77...	4 410	4 227	103...	0 314	0 312
26...	13 368	11 904	52...	10 208	9 329	78...	4 238	4 067			

Date	Amount
[fol. 185] April 15, 1921, for services first half April	$48.76
May 1, 1921, for services second half April	80.44
May 16, 1921, for services first half May	77.13
June 1, 1921, for services second half May	36.50
June 15, 1921, for services first half June	19.55
July 1, 1921, for services second half June	16.20
August 1, 1921, for services second half July	43.73
August 15, 1921, for services first half August	78.88
September 1, 1921, for services second half August	17.89
Sept. 15, 1921, for services first half September	58.75
Oct. 1, 1921, for services second half September	30.11
Nov. 15, 1921, for services first half November	73.30
Dec. 1, 1921, for services second half November	50.92
Dec. 15, 1921, for services first half December	67.65
Jan. 2, 1922, for services second half December	65.48
Jan. 16, 1922, for services first half January	43.95
Feb. 1, 1922, for services second half January	58.46
Feb. 15, 1922, for services first half February	75.56
March 1, 1922, for services second half February	57.98
March 15, 1922, for services first half March	82.69
April 1, 1922, for services second half March	21.98
April 15, 1922, for services first half April	80.18
May 1, 1922, for services second half April	57.42
May 15, 1922, for services first half May	15.22
June 1, 1922, for services second half May	78.44
June 15, 1922, for services first half June	55.95
July 1, 1922, for services second half June	58.72
July 15, 1922, for services first half July	33.56
Aug. 1, 1922, for services second half July	109.40
Aug. 15, 1922, for services first half August	46.99
Sept. 1, 1922, for services second half August	37.46
Nov. 1, 1922, for services second half October	44.29
Nov. 15, 1922, for services first half November	79.55
Dec. 1, 1922, for services second half November	97.18
[fol. 186] Dec. 15, 1922, for services first half December	74.06
Jan. 1, 1923, for services last half December	79.18
Jan. 15, 1923, for services first half January	20.00
Feb. 1, 1923, for services second half January	87.28
Feb. 15, 1923, for services first half February	88.69

Exhibit "A" BBB.

Exhibit "B" BBB
RAIL ROAD
CROSSING
NEG. B. 1922
N. C. & St. L. A.

Exhibit "6" BBB.

D' B13B.

Date	Amount
March 1, 1923, for services last half February	71.97
March 15, 1923, for services first half March	84.24
April 2, 1923, for services last half March	43.74
April 16, 1923, for services first half April	91.49

(Here follows photographs, marked side folio pages 187, 188, 189, 190, 191, 192, 193, 194, and 195.)

[fol. 196] We agree that the above and foregoing is a condensed and succinct brief of the material portions of the oral testimony and includes the substance of all material portions of all the documentary evidence, adduced on the trial of the above stated case.

This December 18th, 1926.

Reuben R. & Lowry Arnold, Attorneys-at-Law, for Plaintiff. Tye, Peeples & Tye, Attorneys-at-Law, for Defendant.

IN SUPERIOR COURT OF FULTON COUNTY

ORDER APPROVING STATEMENT OF EVIDENCE

The above and foregoing is hereby approved as a condensed and succinct brief of the material portions of the oral testimony, and as including, also, the substance of all material portions of all the documentary evidence adduced on the trial of the above stated case.

This December 18th, 1926.

Edgar E. Pomeroy, Judge Superior Court, Fulton County, Georgia.

[File endorsement omitted.]

[fol. 197] IN SUPERIOR COURT OF FULTON COUNTY

No. 60351

MRS. NORA E. HUGHES, Adm'x,

vs.

WESTERN & ATLANTIC RAILROAD

Trial October 4-9, 1926, Judge Pomeroy Presiding

CHARGE OF THE COURT—Filed Oct. 25, 1926

Gentlemen of the jury, the court instructs you that it is your duty to give careful attention to these instructions, the same as you have been required to give to the evidence and to the argument of counsel. It is necessary for you to give careful attention to this charge in order to understand the law of the case and in order that you may render a true verdict. The work verdict means truth, gentlemen, and that is what you are sworn to render in this case—a true verdict. That is, you are to report what is the truth of this case.

The court wants to instruct you now that it does not intend to express any opinion, or to intimate any opinion, with reference to any of the issues of fact involved in this case. It would be improper for the court to express or to intimate any opinion on any issue of fact, as all of those questions are for the jury to determine, under the instructions and under the evidence. If the court should happen to repeat anything in this case, or relative to this case, during the charge, you should not consider or construe that as an intimation or expression of opinion on the part of the court. The court does not intend to *to* it and it is improper for the court to intimate or express any opinion on any issue of fact.

The petition and the amendments of the plaintiff, and the answer filed by the defendant, constitute the pleadings in the case. They form the issues that you gentlemen are to try, under these instructions that I am giving you.

The court wants to instruct you now that certain counts, [fol. 198] or parts of the plaintiff's petition, shown by an amendment filed by her, known as counts 2, 4 and 6, have

been wholly withdrawn from your consideration and you will give no consideration at all to those counts 2, 4, and 6.

This suit is brought by Mrs. Nora E. Hughes, as administratrix of her deceased husband, Ira L. Hughes, against the Western & Atlantic Railroad. She alleges in her first count that the defendant is a railroad corporation; that it has injured and damaged her in the sum of $50,000.00, for which she asks judgment. She alleges that on April 25th, 1923, about 8:40 a. m., the decedent, Ira L. Hughes, was in the employ of the defendant as a traveling fireman, his duties being to travel on defendant's road on different engines and to instruct firemen as to their duties, and to inspect and help take care of the engines, to see what, if any, troubles the engines have in a mechanical or other way, to inspect fully the engines at all points and to make reports of his findings and of all defects and of other matters to the master mechanic, and to see that engines are steaming properly—being fired properly and that in every way their functions are being performed. She alleges that it was the right and duty of the decedent to ride upon any and all engines of defendant that he might see fit to get upon and to put in his time at this kind of work. She alleges that on April 25th, 1923, the decedent, Ira L. Hughes, pursuant to his duties, got upon the engine of a freight train of defendant which left Chattanooga at about 8 o'clock; that he was busy about the engine until shortly before it reached bridge No. 123, which is in the state of Tennessee; that just before reaching the bridge, to-wit, upon leaving Chickamauga, the decedent, pursuant to his duties, was inspecting the boiler, the cylinders, the steam chest and the front end of the engine and, to that end, he got out of the car on the engineer's side and proceeded with [fol. 199] his tour of inspection on the running board. She alleges that inspections of the steam chest, the cylinders and the machinery of the front end of the engine can only be made when the engine is in operation by getting out upon the running board, and that the running board is provided for that purpose. She alleges that he proceeded around the running board on the engineer's side and then proceeded around the front end of the engine and got upon the running board on the fireman's side, and was inspect-

ing and looking closely at the running and operating parts of the engine underneath him and around him and at the front end of the engine; that he was very intent upon his duties and was absorbed with his duties, and that they were necessary and important; that shortly before the engine reached bridge No. 123, which spans Chickamauga Creek, the engine passed over a dirt road some 30 to 50 feet before reaching said bridge, and that the defendant negligently allowed a low place to remain in the track at this point, to-wit, a place which was not properly ballasted or supported underneath, and which was a low joint and which allowed the engine to give unduly and unnecessarily, to-wit: four or five inches, and upon the engine striking said low place it caused it to tilt and rock unduly, severely and dangerously, and a few feet further on, to-wit, about ten feet from the bridge, it struck another low similar joint, negligently allowed by the defendant to remain on the track on the left side, which added to the rocking motion of said engine on the track, causing the top part of the engine to lean excessively on each side with each swing of the engine from time to time; that the engine extended out on each of said swinging movements from side to side from ten to twelve inches further than it should have moved had the track been in reasonably safe condition. She alleges that, on account of the rocking motion of the [fol. 200] engine from side to side, the bridge having posts upon the side and also having overhead pieces, the decedent, while so upon said running board, had his head thrown in contact with the upright side timbers of the bridge was knocked off the engine and fell into the river beneath and was killed. She alleges that the defendant was negligent in the particulars just stated, and that said negligence was the cause of the death of the decedent, to-wit: that it was negligence in the defendant to allow said low places to remain in the track just before the track entered said bridge; that said low places had been in existence upwards of three weeks, and the defendant, in the exercise of ordinary care, should have known thereof, and was negligent in not repairing said condition and making said track reasonably smooth; that said conditions at said place consisted in a lack of ballast and earth or other substantial material in the track at the end of said two joints,

and that the same, with the constant motion of trains over them, had become sprung and low and weak, and with the weight of the train gave way as aforesaid four or five inches, causing the engine to rock from side to side, and that said condition was especially dangerous just before entrance to the bridge.

The petition further alleges certain negligence with reference to the construction of the bridge, but the court instructs you not to consider those specific allegations of negligence with reference to the construction of the bridge. Those allegations are eliminated from your consideration. That is, allegations of negligence such as relate to the permanent structure of that bridge. The petition further alleges that on account of the acts of negligence set forth in the petition, and which I have generally described to you, the decedent lost his life.

This suit is brought by the plaintiff under the Act of [fol. 201] Congress regulating the liability of interstate carriers to their employees engaged in interstate commerce, and it is claimed that the decedent was engaged in interstate commerce at the time of his death, and that the defendant and the engine and train on which the decedent was riding were engaged in interstate commerce; that said train was proceeding from the State of Tennessee into the State of Georgia and was carrying freight and other articles, including the cars and the train itself, from one state of the union into another state. The plaintiff alleges that her husband was thirty four years of age and had a certain expectancy of life, that he was earning a certain sum of money, and in addition was paid his expenses while out on the road, and it is averred that his earnings would have increased with time. It is alleges that the decedent left surviving him the plaintiff, Mrs. Nora E. Hughes, his widow, and one minor child, a son about eight years of age. It is alleged that the husband contributed practically all he earned to his family and that they were dependent upon him, and his life was of great value to them. The suit is brought for the benefit of the plaintiff and the child, and they ask that such damages be allowed them as are allowed by the Act of Congress, and they aver that the decedent contributed, and would have contributed throughout his entire life, practically all his earnings to

his wife and child, and they claim damages in the sum of $50,000.00.

The plaintiff, by amendment, sets forth that the decedent performed certain additional services which she alleges were worth the sum of $30.00 per month, and which inured to the benefit of herself and child, and she further alleges that the decedent was training and educating the eight year old son, and that this training and education upon the part of the decedent towards the son were worth an additional sum per month.

[fol. 202] By amendment the plaintiff sets forth certain additional counts, which it would not be necessary for the court to read to you in full. However, I have stricken counts 2, 4, and 6 out of the case altogether. In the third count the allegations are substantially the same as in the original petition, except that the third count alleges that the decedent, in getting back to the caboose, went around by the fireman's side of the caboose, there being a contrivance in the way of a hand hold on the top of the caboose on the fireman's side by which one could hold with his hand, and there being a foot-way on which one could place his foot and step on the side of the caboose, this being the way and method provided for employes to get from the front of the engine into the caboose, and the same being the way used customarily and ordinarily with the defendant's knowledge. She alleges that on account of the excessive rocking of the engine from side to side the decedent, while so engaged in passing around said caboose and into the same, had his head and parts of his body thrown in contact with the upright side pieces of the bridge, and was knocked off the engine and fell into the river beneath and was killed.

The fifth count, gentlemen, is substantially the same as the others, except that instead of alleging that the decedent was killed on the running board of the engine by coming in contact with the bridge, this count alleges that the alleged low place in the track, which it is claimed was due to defendant's negligence, caused the engine to rock unduly and severely and dangerously, and that on account of the rocking motion of the engine, the decedent, who had gone out upon the running board in the discharge of his duties as alleged was unbalanced and thrown from the engine and fell into the river beneath and was killed.

To the plaintiff's petition the defendant has filed its an- [fol. 203] swer, in which it admits that it is a railroad corporation; admits that the decedent, Ira L. Hughes was in the defendant's employ as a traveling fireman, his duties being to travel up and down defendant's road on different engines of defendant, to educate and instruct firemen as to their duties; in which it admits that the decedent was upon a freight train of the defendant which left Chattanooga on April 25th, 1923, at about 8 o'clock in the morning, the engineer being Ed. Price and the fireman Will Kemp; in which it further admits the allegations as to the interstate character of the train and as to the interstate character of the employment of the decedent; and in which it admits that the case is to be tried under the Act of Congress of 1908 which regulates the liability of carriers engaged in interstate commerce to their employes. The answer of the defendant denies all other allegations of the plaintiff's petition. The answer further sets up that the decedent had been in defendant's employ as traveling fireman for a number of months prior to his death, and was familiar with the construction of the bridge in question; that the uprights are not nearer to engines passing through than those of a number of other bridges on defendant's line of road and through which decedent was accustomed to pass; that decedent was not required by his duties, nor expected, to get out on the running board and move around on the engine while it was in motion; that he had been specifically instructed not to make inspections on the running board or out of the cab of an engine while the engine was in motion, and it was his duty as traveling fireman not only himself to refrain from such unsafe practice, but to instruct ordinary firemen not to do so, and to see that they did not do so. The defendant says that it was the duty of decedent as traveling fireman to know of the location of fixed structures and clearances [fol. 204] and to instruct firemen to practice personal safely with reference to such structures as did not have clearance sufficient to clear a man on the side of the cab of an engine. Defendant further says that the engine on which decedent was traveling when struck was not of greater width than a number of other engines used by defendant on its said line of road, and with the width of which decedent was familiar, and on which he had been accustomed to travel; that the dis-

tance between the bridge posts is fourteen feet and two inches and the clearance was sufficient to have enabled decedent to have passed safely through the bridge if he had remained upright on the running board of the engine, but it was not sufficient if he did not do so, or if he was undertaking to climb around the cab of the engine when he was struck, as defendant is advised it was probable he was doing. The defendant further says that the decedent, unfortunately, was unmindful of the danger of the situation at the time he was struck and had his back turned towards the approaching bridge, or the bridge which the engine was approaching, but a short distance before he was struck, and had his back turned when he was struck; that the approach of the engine to said bridge was made in open day time and there was no reason why decedent could not have seen the said bridge, or known of the approach to the same, because of any curvature of the track; that it is not true that the deceased was struck because of low places in the track, or because of excessive rocking of the engine; that, on the contrary, defendant says that its track approaching said bridge was in good condition, had been recently before the accident been worked upon, and there was no unusual rocking of the engine in approaching or passing through said bridge.

The defendant's answer is substantially the same as to each count of the plaintiff's petition. In order to get these [fol. 205] contentions more in detail you may read the petition, amendments and answers, but you will not consider counts 2, 4 and 6 or the answers specifically and exclusively relative thereto.

Except as to the matters which are admitted by the defendant's answer, the effect of the defendant's is to impose upon the plaintiff the burden of establishing to your satisfaction by a legal preponderance of the evidence, oral or documentary, the allegations made in her petition. The pleadings are not evidence but merely form the issues to be tried by you.

By preponderance of evidence is meant that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind

to one side of the issue rather than to the other. Your minds should be satisfied as intelligent and impartial jurors to a reasonable and moral certainty that the truth of the allegations of the petition of the plaintiff has been shown to you and has not been successfully met by evidence on behalf of the defendant under the defense interposed by it.

In determining where the preponderance of evidence lies the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or improbability of their testimony, their interest or want of interest, their relationship or want of relationship, and also their personal credibility so far as that appears from this trial. You may also consider the number of witnesses, although the preponderance is not necessarily with the greater number.

If you should find testimony in this case in conflict with [fol. 206] other testimony it would be your duty to reconcile the evidence so that all the witnesses shall be made to speak the truth and perjury shall be imputed to none of them, but if you should find evidence in this case in such irreconcilable conflict that this cannot be done, then it would be your duty to believe that evidence which is the most reasonable and the most credible to you. Gentlemen, if an effort has been made in this case to impeach any witness or witnesses it is for you to determine whether or not such effort has been successful.

The court instructs you that to impeach a witness is to prove to the satisfaction of the jury that such witness is not worthy of belief. One of the methods recognized by the law for impeaching a witness is by disproving the facts testified to by such witness. Another method is by proving contradictory statements previously made by such witness as to matters material to his testimony and to the case.

If a witness should be successfully impeached, that is to say, if it should be proven to the satisfaction of the jury that a witness is unworthy of belief, then and in that event it would be the duty of the jury to disregard the testimony of such witness entirely, unless the same should be corroborated by other credible and unimpeached testimony, direct or circumstantial.

The credibility of witnesses being entirely for the jury, it is for the jury to determine whether or not a witness has been successfully impeached, and what weight or credit the testimony of such witness should receive.

Gentlemen, with reference to certain photographs which have been admitted, the court instructs you that such evidence has been admitted by the court for the sole and only purpose of illustrating to you, if they do, the conditions existing at the time and place of the alleged accident, and you will not give effect to such evidence for any other purpose. [fol. 207] The conditions existing before or after the accident are not material to this case. The real question would be the conditions existing at the place and on the date of the alleged injury. So you will determine from all the evidence, oral and documentary, what the conditions were at that time and place and whether or not the defendant or plaintiff were negligent as charged relative thereto.

The court instructs you that if the plaintiff recovers in this case she must recover upon some or all of the allegations of negligence contained in the petition, and cannot recover upon any state of facts or negligence except those in plaintiff's petition. She is not required however, to prove every allegation of alleged negligence set forth in her petition. It is sufficient if she shows by the evidence that any one or more of these allegations of negligence occurred, that they constituted negligence and that such act or acts was or were the proximate cause of the decedent's death. If the evidence shows this, the plaintiff is entitled to recover damages unless barred by some other rule of law which will be given you in this charge.

The court instructs you that negligence of the defendant, if it existed, which was not the proximate cause of the death or materially contributed thereto, could not be the basis of a verdict in favor of the plaintiff.

This case is being tried under an Act of Congress of 1908. So far as the same is applicable to this case, that act provides that every common carrier by railroad, while engaging in commerce between any of the several states of the Union, shall be liable in damages, in case of the death of any employe, to his or her personal representative, for the benefit of the surviving widow and children of such employe for such death, if such death results in whole or in

[fol. 208] part from the negligence of any of the common carrier's officers, agents or employes, or by reason of any defect or insufficiency due to its negligence in its appliances, track, road bed or other equipment.

This act further provides that in all actions brought against any railroad under any of the provisions of this act to recover damages for the death of an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

The court instructs you that there are certain risks of an employment which an employe assumes in entering the *the* employment, and if the injury results from some of these assumed risks, then there is no liability for such injury on the part of the employer. An employe assumes the risks of such dangers as are normally and necessarily incident to the occupation, whether he is aware of them or not. A risk of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work or suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and recognized them.

An employe does not, however, assume the risk of conditions of which he is not aware, or of which in the exercise of ordinary care, he could not have discovered.

The court instructs you that the fact of an accident to an employe carries with it no presumption of negligence; and it is an affirmative fact for the plaintiff to establish that the employer has been guilty of the negligence as [fol. 209] alleged. It is not sufficient for the plaintiff to show that the defendant may have been guilty of such negligence; the evidence must point to the fact that it was; and where the testimony leaves the matter uncertain it is not for the jury to guess as to the existence of such negligence and find that the negligence of the defendant was the real cause of the disaster if there is no satisfactory foundation for such conclusion. On that question, gentle-

men, you will apply the rule of the greater weight or preponderance of the evidence, as I have previously defined it to you, and on all questions of fact you will apply that rule of the greater weight of preponderance of the evidence.

You are instructed that negligence is the failure to exercise legally required care. The care which was required of the defendant in this case, as well as that which was required of the decedent, was ordinary care. Ordinary care is that care which every prudent person would exercise under the same or similar circumstances. As stated, negligence is a failure to exercise the care which the law requires.

Where one enters the employment of a railroad company it is his duty to exercise that care and caution which the perils of the business, which are known to him or which by the exercise of ordinary care would be known by him, demand.

The court instructs you that, so far as the bridge alone is concerned, it was a fixed structure upon the defendant's line of track, and that the decedent would have assumed the risk of any injury which was due to the bridge alone.

The court instructs you that it is not sufficient to relieve a servant from assumption of risk as to the proximity of permanent structures on his master's premises that he may not actually know the distance of such structures from the [fol. 210] place where he is accustomed to work. If such a structure, or portions thereof, as for instance a railroad bridge, within the observation of a man of ordinary care, is so near to the side of an engine passing into the bridge, which engine is itself no wider than those on which the servant has been accustomed to pass through the bridge, as to make it unsafe for him to be with his body or portion thereof extending beyond the outer edge of the engine, then the servant assumes the risk of being so, though he, himself, may not actually know the width of the bridge or the distance of such portion of the bridge from the engine or track. He not only must not actually know but he is chargeable with a knowledge of the peril if plainly observable.

The court instructs you that if the defendant was negligent in respect to the condition of its track, and if you find that the decedent was not chargeable with negligence in not knowing the condition of the defendant's track, if it

was a defective and dangerous condition, and if you find that the defective condition of the track, being negligence as just stated, caused the engine to rock or tilt from side to side, as alleged in the petition, and if you find that this condition of the track causing this rocking or tilting of the engine was the cause of the decedent coming in contact with the timbers of the bridge, as alleged in the petition, or was the cause of the decedent being thrown from the running board of the engine, as alleged in another count of the petition, and if the plaintiff's negligence, if he was negligent, was not the sole and only cause of his death, then and in such event the plaintiff would be entitled to recover in this case.

You are instructed that under the Act of Congress it was the duty of the defendant to exercise ordinary care to keep its track and road bed in proper condition and that if, because of any defect or insufficiency due to the defendant's [fol. 211] negligence in its tracks or road bed, any employe is killed, that then the personal representative of such employe may maintain an action and recover such damages as, under the law, might be assessed under instructions to be hereafter given you.

While the bridge alone would constitute an assumed risk, as far as the decedent is concerned, this would not prevent a recovery if the defendant was negligent in respect to the condition of its track and if that condition of the track was the cause, by the rocking of the engine, if it rocked, of the decedent being caused to come in contact with the bridge, or if that negligent condition of the track, if it was in that condition, caused the decedent to be thrown from the running board of the engine and killed.

You are instructed that if the decedent was negligent, and if his negligence was the sole and only cause of his death, then there could be no recovery in this case.

As I have heretofore instructed you as to the allegation of negligence in the construction of the bridge at which Mr. Hughes was killed you should find in favor of the defendant.

The court instructs you as to the allegation of negligence with regard to the track and road bed you should find in favor of the defendant unless the evidence satisfies your minds to a reasonable and moral certainty that such negli-

gence existed at the time said Hughes was killed, and that the same was the proximate cause of his death or materially contributed thereto.

The court instructs you that if the existence of low places in the track was a usual and ordinary risk of the service, then the danger from the same was a risk assumed by said Hughes.

The court instructs you that a railroad company is not an insurer of the life or safety of its employes. Its duty [fol. 212] as to providing them a safe place to work would be discharged by the exercise of ordinary care on its part to provide a reasonably safe place for such work as he was called upon, by his duty as its servant, to do, under such conditions as it should have reasonably anticipated would exist in the method of his discharging his duties as its servant.

The court instructs you that if the plaintiff in this case has not proved, by a preponderance of the evidence, that the defendant was negligent in some one or more of the particulars described in the petition, then there can be no recovery of damages in this case. You are instructed, however, that if the defendant was negligent in some one or more of the particulars described in the petition in reference to the condition of the defendant's track, road bed and right of way, and if such negligence in part was the cause of the death of the decedent, then, in such event, if you find that the decedent was guilty of negligence, such negligence of the decedent would not entirely defeat a recovery, but would only diminish or reduce the damages which would be awarded to the plaintiff. In such case of negligence on the part of the decedent, Mr. Hughes, the damages would be diminished by the jury in proportion to the amount of negligence attributable to the employe, Mr. Hughes.

If you find from the evidence that the decedent was guilty of negligence in the manner of performing his duties or in not properly guarding against danger under the circumstances of the case, or if he was guilty of negligence in violating instructions in being out upon the running board of the engine, if you find there were any such instructions, still, if you find that the defendant, the railroad company, was guilty of negligence which in part contributed to the

death of the decedent, Mr. Hughes, then, in such case, you would still find damages for the plaintiff, but in such case [fol. 213] the negligence of the decedent, Mr. Hughes, would reduce the amount of damages in proportion to the amount of negligence attributable to him. In other words, if the cause of the death of the decedent was an assumed risk there could be no recovery, but mere negligence on the part of the decedent would not prevent a recovery of damages if you find that the defendant was also guilty of negligence which in part contributed to his death.

Negligence is a question of fact for the jury under proper instructions from the court. The court can give the jury the general standards of diligence and care, but, as to whether the conduct of the parties comes up to or falls short of these standards is a question of fact for the jury. The court in this case has confined the jury, in their consideration of the question of negligence, to the condition of the defendant's track, road bed and right of way, but the allegation as to the bridge and its upright posts is left in the petition and left in the case as descriptive matter and as explanatory of the method in which the other alleged negligence, to-wit, the defective track as plaintiff contends operated to cause the death of decedent by decedent coming in contact with the bridge.

The court instructs you that if you are not reasonably satisfied from the evidence, by a preponderance of evidence, as to what caused the death of the plaintiff's intestate, then your verdict must be for the defendant. If the evidence in this case satisfies you that the defendant was not guilty of the acts of negligence set forth in the petition of the plaintiff, then you must return a verdict for the defendant, although there may be some evidence to sustain such averments.

The court charges you that even if you find from the evidence that the defendant's track was not in good condi- [fol. 214] tion, still there can be no recovery unless that condition was proximately responsible in whole or in part for the decedent's death.

Even if you find the defendant negligent as averred in the petition, still there can be no recovery if the danger therefrom was one normally incident to railroad operation.

The court instructs you that if you find from the evidence that there is always some play to a locomotive running about 20 miles per hour, or more, and that due to curves, application of brakes, and other causes, jerks and jars are frequent and inevitable, and if you further find from the evidence that the deceased was thrown from the side of his engine because of a jerk or jar or movement which was neither abnormal nor unusual, but was such as regularly and inevitable occur in railroading, then I charge you that the deceased assumed the risk thereof, and your verdict, under such circumstances, would be for the defendant.

The court instructs you that it is the absolute duty of such an employe as the decedent Hughes to obey the orders or instructions of his employer, the railroad, to which his attention had been directed, and if you find from the evidence that the proximate cause of the deceased's death was his violation of one of defendant's rules, then there can be no recovery and your verdict, under such circumstances, would be for the defendant.

The court instructs you that if you find from the evidence that the deceased was a mature, experienced and intelligent fireman, familiar with the road over which he was operating, and of the structures thereon, and particularly that he was familiar with the presence and location of bridge 123.6; and if you further find from the evidence that the deceased would not have been killed unless he had forgotten, in the absence of emergency, necessary absorp-[fol. 215] tion or like reasons, the presence of this bridge, then there can be no recovery and your verdict must be for the defendant.

The defendant contends in this case that it was not negligent; that the death occurred as an assumption of the risk, and that the death was the result of decedent's negligence solely. The defendant claims that it was not guilty of any of the acts of negligence alleged in the petition of the plaintiff. It claims that it exercised the care required by law, that is to say, ordinary care to have its track and structures, and keep same, in reasonably safe location and condition for use by its employes in the work required of them, and that it was not because of failure on its part to exercise

such care that Mr. Hughes was killed. If you find that the evidence does not show that this claim is untrue your verdict should be for the defendant.

The court charges you that an employe is chargeable with the assumption of a risk if he knew of the defect originally or is presumed from its obviousness to have known of it, and knew that it endangered his safety, or the danger was so obvious that an ordinarily prudent person, under the circumstances, would have apprehended it. The employe assumes, as an incident of his service, any risk which arises from the permanent visible condition of his master's plant.

A servant, in an action on an alleged failure to furnish a safe place to work, must also show that he did not know, and had not equal means of knowing the truth, and by the exercise of ordinary care could not have known thereof.

The court charges you that a servant so absorbed at the time of the injury in performing a necessary duty as to be oblivious of his surroundings or thereby rendered incapable of exercising his previous knowledge of the [fol. 216] existence or proximity of the dangerous thing, may recover, but it must appear that the injury was not the result of his own carelessness exclusively, nor the result of a risk assumed by him, in the absence of any emergency which would authorize such forgetfulness.

As the court has already instructed you, if the defendant was not guilty of any negligence the plaintiff cannot recover. If the death resulted from an assumed risk, under the instructions given you, or if the decedent was guilty of negligence and his negligence was the sole cause of his death, there could be no recovery.

Gentlemen, if, under the instructions that I have given you, you find that the defendant railroad is not liable you would stop your considerations there and write a verdict for the defendant. If, on the other hand, you find, upon consideration of these instructions and the evidence in the case, that the defendant company is liable, then you would proceed to a consideration of the amount of the damages.

The court instructs you that damages are given as compensation for the injury done, and this is the measure where the injury is of a character capable of being estimated in money. That is, if the law permits damages to be re-

covered in a case like this it seeks to give fair pay or compensation for the injury done, and you should keep this rule in mind in passing upon the different elements of damages involved in this case.

You are instructed that this action is brought for the benefit of the surviving wife and minor son of the decedent, Ira L. Hughes. You are instructed that the measure of damages in such a case as this is the financial benefit in a pecuniary way to the widow and child which would probably have resulted from the continued life of the decedent had he lived. Damages are such as flow from the deprivation of pecuniary benefits which the beneficiaries would reason-
[fol. 217] ably have received if the decedent had not died from his injuries.

Money which the deceased would have spent upon himself, such as for clothing, doctor bills, traveling expenses, smoking, and other amounts, could not be considered as a part of the pecuniary benefit flowing to the wife or child. In passing upon the amount of such probable contributions you may consider his age, his habits, his occupation, whether perilous or otherwise, the wages he was earning, his personal expenses, or any other thing shown by the evidence which may throw light upon the same. You may consider the probabilities of future illness, of loss of wages, or loss of time from illness or otherwise, and the fact that with increasing age a diminution of power to work and capacity to work full time may exist.

In considering the law as to the pecuniary benefits to the wife and child the jury may also consider, in the case of the child, the loss of such training and education as it would, under the evidence, have reasonably received from the parent, and which could only be supplied by the services of another for compensation, and in such case the jury would fix the money value, if any, of the loss of such care, training and education as the deceased would have bestowed upon the child, had he lived.

In considering what benefits the widow and child would probably have received from the decedent, had he lived, the jury should consider pecuniary benefits or actual money which would have been furnished. The jury may also consider any services which the decedent may have rendered

which resulted in financial benefit to the widow and child, in passing upon what future benefits from such source might reasonably have been expected.

Certain mortality tables have been introduced in evidence for the purpose of enabling you to have light upon [fol. 218] the question of how long the deceased might have lived. These tables are not binding upon you, and you may make your own finding upon this question of the decedent's expectancy of life if you desire to do so; but you may use the tables, and if you do use them, the mortality table is only designed for the purpose of giving the expectancy in years of persons of given ages, and you would use it by finding the expectancy opposite the age of the plaintiff in that table.

If you find for the plaintiff and find that the decedent's life was of financial benefit throughout his whole expectancy to his wife and child, then you would decide upon the amount of that benefit to the wife and child throughout the expectancy of the wife and throughout the minority of the child, or throughout the child's life, if you believe that the child would have died before it attained its majority. If the wife's expectancy is greater than that of the husband's, then you would only consider the husbands expectancy in your calculation. If the wife's expectancy is less than the husbands, so far as the benefits to the wife are concerned, you would consider the decedent's earnings only during the expectancy of the wife. If the child's expectancy is less than its twenty-first year and less than the father's, then you would consider the decedent's earnings only during the expectancy of the child, so far as the child is concerned.

In determining the wife's expectancy you take into consideration any testimony which she may have given to the effect that she had been in bad health since she was eighteen years of age, as her continued ill health has a direct bearing on her expectancy and the amount of any award you might make on her account.

When you decide upon the amount of the pecuniary benefits which the decedent's life would have been to his wife and also to his child, under the conditions heretofore stated, [fol. 219] if any, it would not be proper to give the gross

amount of these benefits in the verdict which you would render in this case, because, in as much as the sum is paid down all in cash, the amount would have to be reduced to its present cash value.

You are instructed that the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowances according to the circumstances for the earning power of money, is the proper measure of damages in an action of this character.

It is a question for you to decide, under all of the circumstances of the case and under all conditions which might be present, as to what rate of interest you would use in making a discount of the future value of the decedent's life to his wife and child to its present cash value. Local conditions are not to be disregarded, nor should the discount necessarily be at what is called the legal rate of interest. It is a matter for the jury to decide as to what the earning power of money at this place, and at this time, and under all the conditions which are here present, would be.

You are authorized to make the calculations reducing these sums found by you, if any, to their present value by any proper mathematical calculation. In other words, whatever the annual loss of these beneficiaries might be throughout the expectancy of the decedent, or throughout such part of his expectancy as you decide that these beneficiaries should receive the benefits—the sum would be reduced to its present cash value upon the rate of interest which you fix as reasonable, just and right under all of the circumstances.

In estimating the earnings of a man, it rarely if ever happens that he labors every day until his death, or receives all the while a fixed and regular income from his [fol. 220] labor, nor does his capacity to earn money often remain undiminished until old age. In arriving at what you might find to be the earnings of the deceased, which is one of the steps you would have to take in determining how much pecuniary benefit his life would be to the beneficiaries—you should take all these things into consideration: feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age with a correspond-

ing diminution of earning capacity, and other causes which contribute in a greater or less degree to decrease the earnings of a life time. In estimating what a man might earn throughout his expectancy, a proper allowance and deduction should be made in favor of the defendant for any diminution in labor or its value which would result from any of these sources.

Now, gentlemen, if, from considering the whole case, you find for the plaintiff, the form of your verdict would be: "We, the jury, find for the plaintiff against the defendant" so many dollars, stating the amount or the number of dollars. If, after considering the whole case, you find that the defendant is not liable to the plaintiff you would return a verdict for the defendant, and in that event the form of your verdict would be: "We, the jury, find for the defendant."

Whatever your verdict is, gentlemen, let it be in writing, upon some margin or part of this yellow petition, let it be dated, signed by your foreman and returned into court. I will send out to you, gentlemen, the documentary evidence. You may now retire and consider the case.

After the jury had been out for some time they asked for further instruction, and the following occurred in the presence of counsel representing both sides:

[fol. 221] The Court: Gentlemen, do you wish to ask the Court any question?

A Juror: Your Honor, if we find for the plaintiff, in arriving at or figuring on the damages, what would we be governed by—what he would have expected to make in the future or what he had made in the past? We want a ruling from the court on that, as to which one of those items we would be governed by.

Mr. Arnold: Your Honor, the Supreme Court has passed on that in the 89th Georgia, page 569, the case of Allison vs. the Southern R'y.

The Court: Gentlemen, I will instruct you to this effect, in answer to that question, that you should take into consideration the plaintiff's age, expectancy of life, habits, health, strength, sex, vocation, the rate of wages earned by him in the past by his labor, his present and probable future ability to labor, his prospect of obtaining steady and re-

munerative employment in the future, his prospects, if any, of increased earnings in future—these circumstances in so far as they may be illustrated by the evidence, are circumstances proper to be taken into account.

A Juror: I think that makes it plain, your Honor.

The above and foregoing transcript correctly set forth the instructions given the jury in said case and the same is hereby approved as correct and ordered filed as a part of the record in said case. Oct. 25, 1926.

Edgar E. Pomeroy, Judge Presiding.

[File endorsement omitted.]

[fol. 222] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 223] In Court of Appeals of Georgia

17951

Western & Atlantic Railroad

v.

Hughes, Admx.

Opinion

By the Court, Stephens, J.:

1. This is a suit against a railroad company, by which the plaintiff as administratrix seeks to recover, under the Federal employers' liability act, for damages for the homicide of her husband, which it is alleged was caused by his having been hit by an upright structure of a bridge by the side of the railroad-track and knocked from a running-board on the side of a moving locomotive upon which he had gone in the discharge of his duties as a traveling fireman in the employ of the railroad company, and where it is alleged that as a result of a rocking from side to side and a swaying of the engine, caused by a low place or depres-

sion in first one rail and then the other in the track approaching the bridge, he was thrown into the bridge and knocked off the engine, and that the condition of the track was negligence on the part of the railroad company, proximately contributing to the injury. It appears that the deceased was employed in interstate commerce; and while the evidence as to negligence by the defendant was conflicting, there was evidence from which the jury was authoriezd to infer that upon the approach to the bridge the track contained the depressions in the rails as alleged, and that this was negligence on the part of the railroad company, and as a proximate result thereof the engine, as it approached and entered upon the bridge, was caused to rock and sway laterally, and thereby caused the plaintiff's husband, who was out upon the running board of the locomotive with the consent of the defendant and in the discharge of his duties as traveling fireman in the employ of the defendant, to come in contact with an upright on the bridge and be knocked off the engine and killed, and that the [fol. 224] pecuniary loss suffered by the plaintiff as the result of her husband's death was in the amount found in the verdict. The evidence authorized the verdict.

2. Where upon the trial of such a suit the trial judge instructed the jury that the plaintiff's husband, who was a servant of the defendant, had, in going upon the running-board of the engine in the discharge of his duty, assumed the risk incident to the existence of the bridge in proximity to the defendant's track and its passing locomotive, and withdrew from the jury any consideration as to negligence upon the part of the defendant in respect to the maintenance of the bridge, the overruling of the defendant's demurrers to the petition, objecting to, as insufficient, the allegations of negligence upon the part of the defendant as respects the maintenance of the bridge in close proximity to the defendant's track and its passing locomotive, was harmless.

3. While the damage recoverable under the Federal employers' liability act by the plaintiff for the homicide of her husband is compensation solely for the financial and pecuniary loss suffered by her and his minor child as a result of the homicide of the husband, the services of a

pecuniary and financial value which the husband in his life time performed for the benefit of the plaintiff and the minor child, such as domestic services around the home, including repairing the house and premises, working the garden, milking the cow, looking after the poultry, and personal services in waiting upon the plaintiff while she was sick, and personal services to the child, such as assisting him in his lessons, all of a certain alleged value, are items of damages, and tend to illustrate the pecuniary loss suffered by the plaintiff and the minor child. An amendment to the plaintiff's petition alleging such services was [fol. 225] good as against the general and special demurrers interposed, and the demurrers were properly overruled. Evidence as to such services was properly admitted, and the court did not err in instructing the jury that in arriving at the pecuniary loss of the wife and child, evidence of such services could be considered. Western & A. R. v. Townsend, 36 Ga. App. 70 (135 S. E. 439).

4. Where in such a suit it appears from the evidence that the husband, for whose homicide the suit is brought, was at the time of his death in the employ of the defendant and was in line for promotion as an engineer in its employ, it was not error to admit evidence as to the compensation paid by the defendant to engineers.

5. Where certain evidence as to the installation of guard-rails in the track at the place of the accident a short while after its occurrence, which was offered by the plaintiff and admitted over the objection of the defendant, was later during the progress of the trial voluntarily withdrawn by the plaintiff without objection from the defendant, and where the court instructed the jury that this evidence was withdrawn from their consideration, the admission of such evidence was harmless, since from its nature it can not be said that, after the jury were instructed to disregard it, it was prejudicial to the defendant. Robinson v. Gray, 22 Ga. App. 25.

6. There was no error in admitting in evidence photographs of the locality of the homicide, including the bridge and the track and the defendant's locomotive approaching it, taken some years after the date of the homicide, where witnesses identified the photographs and testified that they

contained true representations of conditions as they existed a few days after the date of the occurrence, and where it was inferable from the evidence that these conditions ex- [fol. 226] isted at the time of the occurrence, and where the trial judge specifically instructed the jury (City of Thomasville v. Crowell, 22 Ga. App. 383 (4); Waller v. Dawson National Bank, 22 Ga. App. 477; Smith v. State, 23 Ga. App. 76; Rome Railway & Light Co. v. Spratling, 28 Ga. App. 438) that the photographs should be considered only for the purpose of throwing light on conditions at the time of the occurrence complained of.

7. A charge stating a correct principle of law is not error because it fails in the same connection to state another correct principle of law. A charge that if both the decedent and the defendant were negligent, and if the negligence of the defendant in particular was the cause of the death, the negligence of the decedent would not prevent a recovery, but would only diminish the amount of damages recoverable, was not error in that the court did not in the same connection instruct the jury that there could be no recovery upon the defendant's negligence if the decedent assumed the risk of the conditions surrounding the accident.

8. Although under the Federal employers' liability act the amount of damages recoverable, when the negligence of both the decedent and the defendant proximately contributed to the injury, is an amount in the proportion which the defendant's negligence appears to have been to its negligence and that of the decedent combined, a charge which instructed the jury that the damages recoverable should be diminished in proportion to the amount of negligence attributable to the decedent was not more unfavorable to the defendant than the rule as to the measure of damages applicable under the Federal employer's liability act, and a refusal to charge, upon request, the rule under the Federal employer's liability act was not error. South- [fol. 227] ern Railway Co. v. Wessinger, 32 Ga. App. 551 (2), 556.

9. A charge to the jury that the defendant railroad company is under a duty to exercise ordinary care to keep its tracks and roadbed in "proper condition," and that if, because of any defect or insufficiency due to the defendant's

negligence in this respect, an employee is killed, there may, under proper proof, be a recovery in damages, is not error in that it fails to state that the defendant is under a duty to exercise ordinary care to keep its track and roadbed in a reasonably safe condition for such work as the servant is called on by his duty as a servant to do "under such conditions as the railroad company should have reasonably anticipated would be in existence in the method of the employee in discharging his duties as its servant." This charge is almost in the language of the statute which provides that a railroad company shall be liable for an injury or death resulting in whole or in part "by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed," etc. If this charge was error for the reason stated, the objection was removed by an elaboration in the language set out in the objection, in a subsequent portion of the charge, where the jury was instructed that a railroad's duty as to "providing [a servant] a safe place to work would be discharged by the exercise of ordinary care on its part to provide a reasonably safe place for such work as he was called upon, by his duty as its servant, to do, under such conditions as it should have reasonably anticipated would exist in the method of his discharging his duties as its servant."

10. Where, in the trial of a case under the Federal employer's liability act, the court charged the jury, with reference to reducing to a present cash valuation a sum [fol. 228] representing damages for loss of future benefits, that in making such reduction the jury should make an "adequate allowance, according to the circumstances, for the earning power of money," and that it should "be reduced to its present cash value upon a rate of interest which you fix as reasonable, just, and right under all the circumstances," the charge stated a correct rule of law; and in the absence of a special request for a more specific charge, a failure of the court to charge that the jury, in making such reduction, should take into consideration the earning power of money when invested with ordinary care, was not error.

11. No error of law appears, and the evidence supports the verdict found for the plaintiff in the sum of $10,000.

Judgment affirmed. Jenkins, P. J., and Bell, J., concur.

[fol. 229] IN COURT OF APPEALS OF GEORGIA

17951

JUDGMENT

Atlanta, February 29, 1928.

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

WESTERN & ATLANTIC RAILROAD

v.

N. E. HUGHES, Admx.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Jenkins, Stephens, and Bell, JJ., concur.

Bill of costs, $15.00.

[fol. 230] IN COURT OF APPEALS OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Mar. 6, 1928

To the Clerk of the Court of Appeals of Georgia:

Notice is hereby given to you that it is the intention of the plaintiff in error in the above stated cause to apply to the Supreme Court of Georgia for a writ of certiorari to review the judgment of the Court of Appeals of Georgia rendered in the case above stated on February 29th, 1928, affirming the judgment of the superior court of Fulton County, Georgia.

You are respectfully requested to have prepared and certify a copy of the entire record in said cause within the

time provided by the rules of the Supreme Court of Georgia.

This March 6th, 1928.

Western & Atlantic Railroad, by H. C. Peeples, Tye & Tye, Its Attorneys-at-Law.

[File endorsement omitted.]

[fol. 231] In Supreme Court of the State of Georgia

Clerk's Office, Atlanta

Case No. 6539

Notice of Application for Certiorari—March 27, 1928; filed in Court of Appeals Mar. 27, 1928

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of Western & Atlantic Railroad v. N. E. Hughes, admx.

W. E. Talley, D. Clerk Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 232] In Supreme Court of Georgia

6539

Order Denying Certiorari—Filed in Court of Appeals May 14, 1928

Atlanta, May 2, 1928.

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WESTERN & ATLANTIC RAILROAD

v.

N. E. HUGHES, Admx.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

May 14, 1928.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Z. D. Harrison, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 233] IN COURT OF APPEALS OF GEORGIA

PETITION FOR STAY—Filed May 14, 1928

To the Honorable W. F. Jenkins, Presiding Judge, Second Division, Court of Appeals of Georgia:

The petition of the Western & Atlantic Railroad respectfully shows:

Heretofore, on writ of error, there came before the Court of Appeals of Georgia, for decision, the case of Western & Atlantic Railroad, plaintiff in error, versus Mrs. Nora E. Hughes, administratrix of Ira L. Hughes, deceased, defendant in error, said cause having originated in the superior court of Fulton county, Georgia.

Thereafter, and on the 29th day of February, 1928, the said Court of Appeals of Georgia, Honorable W. F. Jenkins, Presiding Judge of the Second Division thereof, af-

firmed the decision of the superior court of Fulton county, Georgia, which had been complained of in said cause.

Thereafter, and in due time, and after due notice given, your petitioner filed with the clerk of the Supreme Court of Georgia its petition for certiorari in said cause, accompanying the same with a full copy of the record in the cause and brief of its counsel.

Thereafter, on the 2nd day of May, 1928, said Supreme Court of Georgia rendered its decision refusing to grant the certiorari as applied for, and the remittitur from said Supreme Court of Georgia has reached the hands of the clerk of the said Court of Appeals of Georgia.

Your petitioner avers that, believing it has good cause to apply to the Supreme Court of the United States for writ of certiorari to the Court of Appeals of Georgia in the cause, on the ground that rights, privileges and immunities are set up or claimed by it under Statute of the United States, to wit, the Statute commonly known as the Federal [fol. 234] Employer's Liability Act, 45 U. S. C. A. Secs. 51-59, U. S. Comp, St. Secs. 8657-8665, and under and in accordance with the Act of Congress of February 13th, 1925, to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes, it in good faith intends to make such application.

Your petitioner shows that it will require some time to have a duly certified copy of the record made in said cause, have the same printed and file the same together with its petition for writ of certiorari and printed supporting brief in the office of the Clerk of the Supreme Court of the United States, as is provided by Rule No. 35 of the Supreme Court of the United States, and have the same passed upon, and that in the meantime and until your petitioner shall have reasonable opportunity to make application for such writ of certiorari and have the same passed upon, your petitioner desires and prays for a stay of the execution and enforcement of the judgment in said cause, in conformity to Section 8*d* of said Act of Congress and paragraph 6 of said Rule No. 35 of the Supreme Court of the United States.

Wherefore, your petitioner hereby offering to make such bond and with a sufficient security as to your Honor may

seem just and conditioned as provided by said Act of Congress, prays that the execution and enforcement of the judgment in said cause may be stayed, and the return of the remittitur therein to the said superior court of Fulton county, Georgia, may be withheld for the period allowed by said Act of Congress, for the making of application of such writ of certiorari and obtaining an order granting its application for said writ, and making its plea good in the [fol. 235] said Supreme Court of the United States.

And your petitioner will ever pray, &c.

Western & Atlantic Railroad, by Tye, Thomson & Tye, Its Attorneys-at-Law.

IN COURT OF APPEALS OF GEORGIA

[Title omitted]

ORDER STAYING REMITTITUR—Filed May 14, 1928

The above petition being considered, it is ordered that the same be filed, together with this order, with the clerk of this court.

It is ordered, further, that upon the filing with the clerk of this court, within ten days from this date, by plaintiff in error, of bond with good security to be approved by me as Presiding Judge, in the sum of Twenty-five Thousand Dollars ($25,000), payable to the defendant in error and conditioned that if plaintiff in error fails to make its application for writ of certiorari from the Supreme Court of the United States, in said cause, within the period allotted therefor, or fails to obtain an order granting such application, or fails to make its plea good in the Supreme Court of the United States, then the said bond shall be of full force and effect,—the return of the remittitur in said cause by [fols. 236 & 237] the Clerk of this Court to the Clerk of the Superior Court of Fulton County, Georgia, and execution of the judgment therein shall be stayed until the termination of said certiorari proceeding, either by refusal of the Supreme Court of the United States to grant the writ of certiorari, or after granting said writ adjudging an affirmance of the judgment of the Court of Appeals of Georgia in said cause. This 14th day of May, 1928.

W. F. Jenkins, Presiding Judge.

Bond on stay for $5,000.00, approved and filed May 14, 1928, omitted in printing.

[fol. 238] [File endorsement omitted.]

[fol. 239] Certificate of Logan Bleckley, Clerk of Court of Appeals of Georgia, to foregoing transcript paper omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

Endorsed on cover: File No. —. Georgia Court of Appeals. Term No. —. The Western & Atlantic Railroad, petitioner, vs. Mrs. Nora E. Hughes, as administratrix of the estate of Ira L. Hughes, deceased. Petition for writ of certiorari and exhibit thereto. Filed —— —, 19—. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the Court of Appeals of the State of Georgia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3930)

Office Supreme Court,
FILED
AUG 4 192
CHARLES ELMORE CR
CL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 234

THE WESTERN & ATLANTIC RAILROAD,

PETITIONER,

Versus

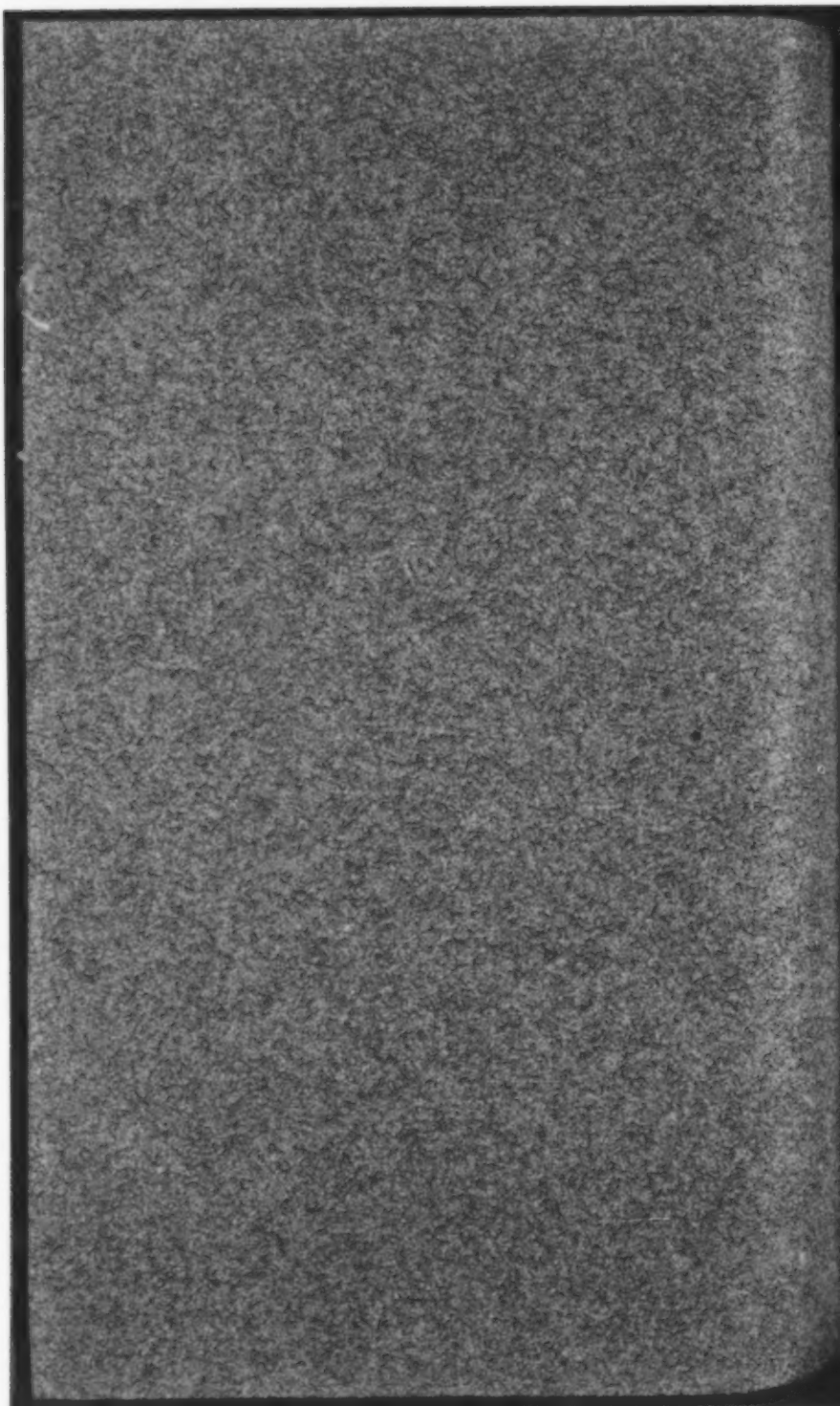
MRS. NORA E. HUGHES, AS ADMINISTRATOR OF THE ESTATE OF IRA L. HUGHES, DECEASED, RESPONDENT.

ANSWER AND BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI IN THE CASE ABOVE STATED.

REUBEN R. ARNOLD,

Attorney for Respondent in Certiorari.

(33,543)



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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 234

WESTERN & ATLANTIC RAILROAD,
PETITIONER,

versus

MRS. NORA E. HUGHES, AS ADMINISTRATOR OF THE ESTATE OF IRA L. HUGHES, DECEASED, RESPONDENT.

ANSWER OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS

The statement of facts in the petition does not do justice to the respondent in that it is incomplete and presents only the defendant's view of the facts.

This case involves only questions of fact. The suit was brought under the Federal Employer's Liability Act, and all the propositions of law arising thereunder were well understood by the court, were fully covered in the court's charge, and were dealt with by the Court of Appeals.

The insistence in the petition for certiorari that only questions of law are involved, and that under the facts there can be no recovery, is, we respectfully submit, unfounded. Four courts have already disagreed with the petitioner in certiorari, to-wit, Judge Ellis, upon the first trial, in the Superior Court; Judge Pomeroy, upon the second trial, in the Superior Court; the Court of Appeals of Georgia, in affirming the judgment upon the record; and the Supreme Court of Georgia, in denying a certiorari to the Court of Appeals of Georgia.

Hughes was a traveling fireman for the railroad. He was on the running board of the engine, inspecting the same, when he was hit by the upright timbers of a bridge, thrown into the river below, and killed. A traveling fireman is not a regular fireman, but is an instructor of other firemen. He rides on any engine, and is not under the jurisdiction of either the engineer or anybody else on the train. He makes his own inspections in his own way (See the evidence of Price, the evidence of Countryman, and the evidence of Ransom, on pp. 133, 122, and 126, respectively, of the Record).

It is the duty of the traveling fireman to see that the mechanism of the engine, so far as firing and steaming is concerned, is all right. He is required to make personal inspection of different parts of the engine, and see how the engines function. This particular engine had on it a new automatic stoker,—that is, a device which fires the engine by machinery. An important feature in firing is to ascertain how the smoke comes out of the stack. If there is too much smoke, the firing is not being properly done. The smoke must come out of the stack round and full; that is, cover all the space in the stack. If it comes out of a portion of the stack, there is a defect in the firing (See the evidence of Ransom, p. 129 of the Record).

The proof, as we shall hereinafter show by reference to the

witnesses and the documents, showed that it was the custom and practice of traveling firemen to go out on the engine while it was in motion, observe the smoke and the stack, and observe all the parts of the machinery about the front of the engine which are visible, to see that they were functioning properly. This was the main and most important duty of the traveling fireman. Nobody had ever laid down any rule as to when he should go out on the running board, or how he should do it. We will hereinafter show that the claim by one of the defendant's witnesses that an oral instruction was given the decedent not to go upon the running board is not corroborated by any other facts in the Record, is shown by engineers of long standing on the railroad to have never been heard of, and to be an incredible piece of testimony which the jury were well warranted in not believing. Besides, such an act might be contributory negligence, but would not bar a recovery if the negligence of the defendant contributed. It will not do to claim, as the defendant did in substance, that the doctrine of assumption of the risk covers the same ground as the doctrine of contributory negligence, on part of the injured person. Each works in a separate orbit. As a rule, the doctrine of assumption of the risk appertains to fixed structures or conditions, while contributory negligence pertains to the manner, usually, in which the employe does his work.

It was the duty of the traveling fireman, under the printed instructions and reports handed him by the defendant, and which he was compelled to fill out upon making each trip, to examine and report upon the condition of numbers of things about the engine. A large number of these things could only be properly reported upon by going to the front of the engine while it was in motion, as we will hereinafter show. It was not necessary that there should be some defect in the engine which the traveling fireman should inspect. It was his standing duty on each trip to report on a number of different things, and

in order to do so, he must get out and go over the running board and around the engine when it was in motion. It was for the traveling fireman to select his own time to do this job. Had this track been in good condition, and this engine not been rocking and swaying unduly, there was no danger whatever in going on the running board as the engine passed through this bridge. There was over two feet clearance between the widest part of the engine and the side timbers of the bridge.

The engineer, Price, denied that there was any trouble with his engine on this occasion, but the plaintiff and Mrs. Josie Hichols, on pp. 135 and 136 of the Record, testified that there had been a knock in the front part of this engine, so the engineer Price had told them immediately after the occurrence. This, however, is not necessary, in any sense, to justify the decedent in going out upon the engine in his duty of inspection.

The witness, Holcomb, saw the decedent at the front end of the engine as it approached the bridge, looking down at something (See Holcomb's evidence, Record p. 104).

The witness, McHan, who was on the engine, saw the decedent when he was watching something at the front end of the engine (Record p. 123).

The witness, Kemp, also testified, as will be hereinafter shown, that he was watching the smoke of the engine (See the Record, p. 58).

The engineer testified that the smoke, as it came out of the stack, could not be seen from the cab of the engine (See the Record, p. 135).

Hughes was seen by the engineer to have viewed the engine on his side from the right hand running board (See the evi-

dence of Price, Record p. 134). He went around the running board, descended steps at the front end of the engine, and came around on the fireman's side, where the fireman and the brakeman saw him (See the evidence of Kemp, Record pp. 58 and 59, and McHan, Record p. 123).

The last that was seen of him was by Kemp and McHan, who saw him approaching the caboose, and who saw him about the time the engine entered the bridge.

Hughes was last seen upon the running board. It was thought he was preparing to climb into the caboose by the gangway. It is manifest, therefore, that he was either pushed off the running board, or that he was undertaking to get around the cab by the way provided for entering and leaving the caboose from the running board. An examination of the picture of the engine in the Record will show a place where hands can catch on top of cab and a foothold by the side of the engine cab which can be used for this purpose. The three counts cover every way in which he could possibly have been killed. Hughes' body was fished out of the river at a place near the entrance to the bridge (See the evidence of Parker on p. 83 of the Record).

Hair and blood were found on the post on the left hand side of the bridge at about thirteen to fifteen feet from the floor (See the evidence of Holcomb, Record p. 106, and Headrick, Record p. 78).

There was a deep cut in the back of Hughes' head when his body was found (See the evidence of Headrick, Record p. 78).

The clearance between the side of the caboose of the engine and the upright timbers of the bridge was over two feet (See the evidence of Holcomb as to the width of the bridge being fourteen feet, two and one-fourth inches, Record p. 106, and

see the evidence of Ransom as to the widest part of the engine at the cab being ten feet two inches, Record p. 126). Engineer Price said it is about three feet clearance (Record p. 135).

It is manifest, therefore, that Hughes, either standing on the running board, or walking around the cab, would have had plenty of space in which to clear the timbers of the bridge, if the engine should be running smoothly.

But the cause of Hughes' head coming in contact with the upright timber of the bridge, as the physical evidence showed, is not hard to ascertain.

About thirty or forty feet from the north end of this bridge was a dirt road which crossed the track, in which the water was allowed to accumulate, and at which there was a bad low place or joint in the track. A little closer to the bridge was another bad low place or joint. Trains which were observed during the same week approaching this place were seen to give way when these low joints were reached, and begin a severe rocking or swaying motion. The trains were not observed to rock perceptibly before striking these low joints. The various witnesses (and hereinafter we will refer to their names and the pages of the Record on which their evidence appears) say that this low place had existed some weeks before the accident and death of Hughes, and also that it was present on Saturday after Wednesday of the week on which Hughes was killed, and photographs even taken over two years later showed bad places in the track at these points.

The witnesses who observed trains go over this place at about the time of this occurrence noticed that the engines, which were running without rocking until reaching these low places, began to rock and sway severely after these low joints were struck. The distance that the track gave way was estimated at

all the way from two or three to four or five inches. The rocking motion of the engine was seen to continue until the engine reached the bridge, and the witnesses vary in their testimony as to how close the side of the cab came to the bridge, the witnesses making it from about six to eight inches.

These witnesses, it is true, were not expert railroad men, and were laymen, but they saw these facts, they observed these occurrences, and they could testify to physical facts as well as anybody else.

The railroad makes the contention that all tracks give a little bit, and that it is nothing unusual for tracks to give some, and that only experts could tell the bearing of a giving way of a track upon the conduct of an engine in operation. We submit that these witnesses not only told how far the track gave way as the train went over it, but also observed its physical effect on the engine, and saw how near the side of the engine came to the bridge, which could well account for carrying the body of a man who was on the engine so close to the upright pieces of the bridge that his head would be stricken.

As to whether giving way of a track as much as was testified to by the plaintiff's witnesses would cause an engine to rock unduly and severely, the master mechanic of the defendant (as will be hereinafter shown by giving his name and the page of the Record on which it appears) testified that if the track gave way as much as those witnesses testified to, there would even be danger of dèrailing an engine, and several of the witnesses, notably Finney, testified as to the rocking and swaying effect that low joints in a track have upon an engine. We will show all this hereafter in the brief.

Hughes knew nothing about this condition of the track. He was a traveling fireman, and it was his duty only to look after

the condition of the engine. He had nothing to do with the track. He was not even responsible for the running of the engine, like the engineer is. There might be some reason for saying that the engineer must know the rough places in the track, as he controls the speed of the engine, but if a fireman or a traveling fireman should find it out, it would be by some occurrence outside of what his duties require. There is no reason why he should know it, or even notice it.

There was a part of the declaration in this case which alleged negligence in constructing the bridge so close to the rail, and not giving sufficient clearance for trains. This part of the case was eliminated in the charge of the court. The judge below charged the jury that the decedent assumed all the risk which arose from the nearness of the upright timbers of the bridge to the side of the engine. He left it to the jury, however, as a question of fact, to decide, first, whether the defendant was negligent in leaving its track in defective condition at this point, and, secondly, whether this negligence was the cause of Hughes' death. He charged the jury fully as to assumption of the risk as to all phases of the case, using practically the language which has been used by this court in several cases.

ONE NEW TRIAL WAS GRANTED BY THE TRIAL COURT ON GROUND THAT THE FIRST VERDICT OF $17,500 WAS EXCESSIVE; ON SECOND TRIAL, A VERDICT FOR $10,000 WAS RENDERED, WHICH WAS SATISFACTORY TO THE TRIAL COURT, AND THIS IS THE JUDGMENT WHICH WAS AFFIRMED BY COURT OF APPEALS.

As stated in the heading hereto, on the first verdict a new trial was granted by Judge Ellis, one of the judges of the

Superior Courts of the Atlanta Circuit, who tried the case, and his opinion appears on pages 46, 47, 48 and 49 of the Record.

Judge Ellis granted the new trial, as will appear from his opinion, mainly because he considered the amount too large, and it was his opinion that a larger reduction should have been made because of the contributory negligence of the decedent, Judge Ellis believing that the decedent was guilty of contributory negligence which should have reduced the recovery. In his opinion, Judge Ellis used the following language (Record p. 48):

> "My opinion is there will always be a finding for the plaintiff of some amount in this case. I am not deciding whether there ought to be or ought not to be, but what has greatly disturbed me is, whether the amount of this verdict can be justified, under the circumstances, considering the doctrine of contributory negligence."

When the second trial occurred in Fulton Superior Court, a different judge presided, Judge E. E. Pomeroy. It does not appear from this Record what the evidence was on the first trial. Upon the motion for new trial being filed when the second verdict was rendered, the same was overruled by Judge Pomeroy, as appears from the Record on p. 45.

REPLY TO POSITION IN CERTIORARI THAT THERE WAS UNCERTAINTY AS TO THE METHOD BY WHICH DECEDENT WAS KILLED AND THAT SUIT WAS BROUGHT IN THREE COUNTS.

The petition for certiorari calls attention to the fact that the suit was brought in three counts: one count alleging that while Hughes was on the running board, that due to the excessive

rocking of the engine and the dangerous proximity of the sides of the bridge, his head came in contact with the upright timbers of the bridge; the second count alleging that he had left the running board, and, while engaged in passing around the cab (there being a place provided for that purpose) he was knocked off by the upright timbers of the bridge; the third count alleging that, while upon the running board, he was unbalanced by the rocking motion of the locomotive and thrown off. These various counts appear on pages 6, 7, 13, 18 and 19 of the Record.

It is the practice in Georgia to allow a petition to contain several distinct counts referring to the same transaction and differing from each other in substantial particulars as to the details of the transaction, and the case may go to the jury upon all of the counts. See Gainesville &c. Ry. vs. Austin, 122 Ga. 823.

The declaration also alleged, as applicable to the entire transaction, that before reaching the bridge in question, the track passed over a dirt road; that the defendant negligently allowed a low place to remain in the track at this point, to-wit: a place which was not properly ballasted or supported underneath, which was a low joint and which allowed the engine to give unnecessarily and unduly, to-wit: four or five inches, and that upon the engine striking the said low place it was caused to tilt unduly, severely and dangerously, and that a few feet further on, to-wit: about ten feet from the bridge, it struck another similar low joint, which added to the rocking motion of the engine and caused the top part of the engine to lean excessively on each side with each swing of the engine, and caused the engine to rock from ten to twelve inches further than it would have swayed had the track been in reasonably safe condition; that on account of the rocking motion, and on account of the dangerous proximity of the side structure of the bridge, the decedent's head was thrown in contact with the upright

timbers of the bridge (See Record p. 7). This allegation as to the defective condition of the track is carried into all of the counts.

As to the claim that there was uncertainty as to how the decedent was killed,—there was, under the plaintiff's evidence, abundant tesimony to find that the decedent was out upon the running board of the engine inspecting the working parts of the front thereof, as well as the emission of smoke from the stack, there being a new stoker on the engine, and that he could only do this from a place on the front of the engine and while it was in motion, and that he was returning to the caboose of the engine on the fireman's side at the time he was struck.

We do not understand that, because a case is dependent upon circumstantial evidence—whether civil or criminal—the jury is not at liberty to draw all legitimate inferences. The man on the engine, whose testimony we have quoted hereinbefore, saw Hughes in the act of falling by the cab.

We have already quoted the testimony of Kemp. The witness McHan testified that he was on the fireman's side of the engine, he being a brakeman and riding on the engine; that he saw Hughes coming around the front of the engine on the fireman's side; that he was stooping over looking at the cylinders; that when he next saw him, he was coming up the little steps on the running board on the fireman's side, facing the witness; that when witness last saw him, before he fell, he was about where the pumps are on the engine; that as the witness was looking back from his place on the cab, he felt something brush his goggles; some part of Hughes' body hit the witness' shoulder, and he saw Hughes go down; he saw his body go down the bridge like that (See Record pp. 123 and 124).

These witnesses saw Hughes on the running board approach-

ing the bridge. They were paying no very close attention to him. They did see his body fall by the side of the cab, so close as to brush the witness McHan's goggles. It was inevitable that Hughes was hit either from his stand on the running board, or as he was getting around the side of the caboose to get into the engine again. If he had been hit on the running board, the motion of the engine would have carried the engine past his body as it was falling, and might have made it seem to those in the engine as if he fell from the cab. He certainly had not gotten further than the running board or the outside of the cab. That he was hit by the upright post of the bridge was shown by the wound on his head and by the hair and blood on the upright post of the bridge thirteen or fourteen feet above the floor, as was testified to by Headrick and Holcomb, hereinbefore quoted. His body fell into the river and was fished out of the river.

There was clearance for his body, had the engine been running smoothly. The space between the side of the caboose, which is the extreme width of the engine, and the inside of the bridge post was over two feet. Unquestionably, this would have cleared him had he been on the running board, as against any normal movement of the engine. It would have cleared him if he was going around the cab to get in the gangway or window, but, with the engine rocking as it did from these low places in the track, and swaying as much as ten inches or a foot from side to side, it was certainly a reasonable inference that this was what caused his head to come in contact with the timber of the bridge and kill him.

The jury system was devised to solve just such questions as this. That the case is made out by circumstantial evidence does not make it a case of conjecture.

As to the witness Kemp seeing the body of Hughes fall by

the gangway, Kemp testified that of course the motion of the engine would naturally carry him back some (Record p. 59). Kemp saw Hughes as he was in the act of falling (Record p. 59).

There was a wound on the back of Hughes' head, found after his body was fished out of the river (Record p. 83). Hughes' body fell into the river below, just as the train entered the bridge (Record p. 83).

On the left hand front upright part of the bridge (on the fireman's side) hair and blood were found. It was at least twelve feet above the ground (Record p. 83).

The witness Holcomb also found blood and hair on the batter posts thirteen feet and six inches above the floor of the bridge (Record pp. 104 and 105).

We also refer to the various facts stated in the Statement of Facts herein, such as the evidence of Parker on p. 83 of the Record that Hughes' body was fished out of the river, and the evidence of McHan that when Hughes fell his body brushed by Mr. McHan's goggles (Record p. 124).

TRIAL JUDGE ELIMINATED CHARGE IN DECLARATION THAT NEGLIGENCE IN BUILDING UPRIGHT TIMBERS OF BRIDGE TOO CLOSE TO TRACK WAS CAUSE OF HUGHES' DEATH; JUDGE CHARGED JURY THAT HUGHES ASSUMED RISK AS TO CLOSE PROXIMITY OF BRIDGE TIMBERS TO TRAINS; JUDGE CHARGED JURY GENERAL DOCTRINE OF ASSUMPTION OF RISK, AND LEFT TO JURY QUESTION AS TO WHETHER HUGHES ASSUMED RISK OF DEFECTIVE

CONDITION OF TRACK; JUDGE SUBMITTED TO JURY THE CASE ON PROPOSITIONS, FIRST, WHETHER TRACK WAS DEFECTIVE OWING TO NEGLIGENCE OF DEFENDANT; SECOND, WHETHER SUCH NEGLIGENCE WAS CAUSE OF HUGHES' DEATH; THIRD, WHETHER HUGHES WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN BEING UPON RUNNING BOARD, WHICH WOULD REDUCE DAMAGES; AND FOURTH, JUDGE CHARGED ELABORATELY ON ASSUMPTION OF RISK IN SUBSTANTIALLY LANGUAGE LAID DOWN BY THIS COURT, LEAVING IT TO JURY AS TO WHETHER HIS ASSUMPTION OF THE RISK APPLIED TO THE DEFECTIVE CONDITION OF THE TRACK.

That portion of the petition which alleged that the side of the bridge was in dangerous proximity to the sides of the engine was eliminated from the jury's consideration by the charge of the court, the court having charged the jury as follows, to-wit (See Record p. 147):

> "The petition further alleges certain negligence with reference to the construction of the bridge, but the court instructs you not to consider those specific allegations of negligence with reference to the construction of the bridge. Those allegations are eliminated from your consideration. That is, allegations of negligence such as relate to the permanent structure of that bridge."

The court confined the jury to the specifications relating to the condition of the track (See that portion of the court's charge on pages 146 and 147).

As to this condition of the track, the court charged the jury as follows (Record p. 155):

> "While the bridge alone would constitute an assumed risk, as far as the decedent is concerned, this would not prevent a recovery if the defendant was negligent in respect to the condition of its track and if that condition of the track was the cause, by the rocking of the engine, if it rocked, of the decedent being caused to come in contact with the bridge, or if that negligent condition of the track, if it was in that condition, caused the decedent to be thrown from the running board of the engine and killed."

We thus see that the court below eliminated the bridge alone from the case as a claim of liability. This bridge, according to the evidence, cleared this locomotive, when the locomotive was in a normal condition and at rest, twenty-six inches (See Record pp. 86, 88, 193).

It will thus be seen that had there been no unusual rocking of the engine, the decedent's position on the running board, or even getting around the cab, would have been safe.

In Georgia, a claim in the pleadings which is untenable may be eliminated in the charge of the court, and this does so as effectively as a formal order striking the part objected to from the pleadings. The charge of the court therefore eliminated any claim of liability based solely and alone upon the closeness of the bridge to the track. Upon that subject, the Court of Appeals ruled as follows (Record p. 165):

> "2. Where upon the trial of such a suit the trial judge instructed the jury that the plaintiff's husband, who was a servant of the defendant, had, in going upon the running-board of the engine in the discharge of his duty, assumed the risk incident to the existence of the bridge in proximity to the defendant's track and its passing locomotive, and withdrew from the jury any consideration as to negli-

gence upon the part of the defendant in respect to the maintenance of the bridge, the overruling of the defendant's demurrers to the petition, objecting to, as insufficient, the allegations of negligence upon the part of the defendant as respects the maintenance of the bridge in close proximity to the defendant's track and its passing locomotive, was harmless."

Thus, the Court of Appeals confined the consideration of the the case to the condition of the track.

PETITION FOR CERTIORARI CLAIMS ON PAGES 4 AND 5 THAT THERE WAS NO UNUSUAL ROCKING OR LEANING OF THE ENGINE AT THE TIME OF HUGHES' INJURY, AND QUOTES WITNESS KEMP AS SAYING ENGINE WAS THEN RUNNING ALL RIGHT; TESTIMONY OF SEVERAL WITNESSES SHOWED THAT ENGINE GOING OVER THIS PLACE AT ABOUT THIS TIME, ON ACCOUNT OF CONDITION OF TRACK, SWAYED SEVERELY AS BRIDGE WAS ENTERED, MAKING WHAT WOULD OTHERWISE BE GOOD CLEARANCE DANGEROUS; THAT THE TRACK WAS IN DEFECTIVE CONDITION AND THAT ENGINES RUNNING SMOOTHLY UNTIL THE LOW JOINTS WERE REACHED, BEGAN TO ROCK AT THAT PLACE AND ROCKED AND SWAYED UNTIL THE BRIDGE WAS ENTERED.

Much stress seems to be laid on the evidence of the fireman Kemp in the petition for certiorari.

It will be seen from the Record, p. 57, that Kemp was only examined by deposition by the respondent. Kemp was the fire-

man on the engine, and the crew had, of necessity, to be examined in order to show the circumstances attending Hughes' falling off the engine. In no fair sense could Kemp be called the plaintiff's witness. He was still in the defendant's employment at the time of the trial.

Mrs. Hughes also testified on p. 52 of the Record that, during the week that her husband was killed, she had observed two trains pass over the track just before entering the bridge; that the low places in the track started the engine to rocking; that she had not observed it rocking before reaching the low places; that the track gave down four to five inches at the low places; that as it approached the bridge, the engine was rocking and the engine came within six or eight inches of the bridge.

That the track was in defective condition, and that it caused the engine to rock unduly, we will now proceed to demonstrate.

Had the track been in good condition and the rocking of the engine been only moderate, the bridge would have easily cleared the decedent, for there was over two feet of clearance even from the outside of the cab. With the deceased standing on the running board, he would have been over two feet from the sides of the bridge, and with the decedent even climbing around the caboose, he would have had two feet space in which to get around the caboose, which would have been ample had the engine been operating normally.

But with the severe rocking of a structure fourteen feet high, it might easily be seen that the top parts would be brought in close contact with the side of the bridge, which was a danger not to be apprehended by the decedent, and which resulted from the rocking motion of the engine, the rocking motion being caused by the rough places in the track.

Amos Shepherd testified that he had noticed trains running over the track at this crossing for three weeks before the accident (the witness having seen the train enter the bridge); that when trains would go over the track at the low point, water would slosh over the ties; that he didn't know whether there was any joint in the rail at that point; that he just noticed when the ties went down; that he noticed the ties and track went down as trains went over it; that he had noticed this several times when he would be waiting for the train to pass; that he had seen the ties give way when they made that crossing; they would go down; that he did not know how far the track went down, but it looked to him like it went down that far, the length of his finger which may be three inches, something like that; that he had noticed that several times in wet weather when he would be there before the accident happened (Record p. 74).

John Headrick testified that in the week of the death of Hughes, and on the Saturday after Hughes was killed on Wednesday, he went to the place; that he climbed up the side of the bridge and saw hair on the posts on the left side coming south, fourteen or fifteen feet up over; that there is a grade crossing about thirty-five feet from the bridge; that he noticed trains pass over that crossing on that occasion. When the engine passed over the crossing, he noticed a low place in the track and also some slush that went from under the ties, the water slushed out as the train went over, and the track gave down, he would say some three or four inches at that point; that the engine rocked to the right and then to the left; that it was rocking considerably when it hit the bridge; that there were two of those bad places, and then there was one up near the bridge; as the engine entered the bridge, it had a rocking motion; that in the witness' judgment, the engine came in about eight inches of the upright pieces of the bridge (Record p. 78).

Mrs. John Headrick testified that she was at this place on the week of the tragedy; that she saw two trains pass the place; that the rails went down some three or four inches at the low places; that there was a low place on each side of the track; that the engine was rocking when it entered the bridge, and that it appeared to her that the cab where the engineer and fireman sat came within seven or eight inches of the side pieces of the bridge, pretty close to the bridge; that she was on one side of the track when one train went through and on the other side when the other train went through (Record p. 79).

J. C. Headrick testified that he was present on this occasion (Record p. 80), and that he thought the rails went down some four or five inches, and that the engine rocked back and forth, and that it looked to him like the engine came within a foot of the upright pieces of the bridge.

Photographs were taken of the bridge over two years later (See the testimony of Millard Headrick, Record p. 81).

Adams, a photographer, took the photographs (Record p. 63).

These photographs were introduced in evidence, and they show conclusively that the low place had been allowed to remain in the track until October, 1925. We call the court's attention to the photograph on p. 175 of the Record as showing how the ballast was washed from under the ties and how the ties were exposed by the wash of the water coming down from the hill on the west side of the track. The photograph on p. 176 shows the same thing. Especially does the photograph on p. 180 show the extent to which the ballast had been washed out from under the tracks beginning at a joint just at this crossing. The photograph on p. 181 shows substantially the same thing.

We say the plaintiff's evidence established conclusively, first, that the defendant was negligent in respect to the upkeep of its track just north of this bridge. We say, secondly, that it was conclusively proved by witnesses, who saw trains pass over the place practically at the time of the accident, that the effect of this defective track was to cause an engine to rock with great and unusual severity. Third, we say the evidence abundantly established that the decedent, in the performance of his duties, should have inspected all parts of this engine while in operation, and that was the best time to inspect it, and it was his duty to get around that running board and watch the smoke from the stack to see how the new automatic stoker was operating. It was his duty to get around in front of the engine, see the cylinder, observe the condition of the cylinder packing, observe the front end for air leaks, and come around on the fireman's side and take in the condition on that side. Fourth, we say that it is not a question of assuming the risk from the bridge, but a question of whether the decedent assumed any risk from a defective track which is not shown to have been brought to his knowledge, or as to which he is not charged with knowledge, under practically all the decisions. Fifth, we say that, so far as the bridge alone is concerned, the two feet clearance would have amply sufficed to have enabled the decedent to pass through, and, so far as the bridge was concerned, he was not taking any unusual risk in being out on the running board. Sixth, we say that the overwhelming circumstances of the case show that it was the excessive rocking of this engine which caused the death of the decedent, either (a) while he was upon the running board by throwing his head in contact with the bridge; or (b), while he was on the running board by causing him, by the rocking and swaying of the engine, to become unbalanced and thrown from the engine; or (c) while he was undertaking to get around the caboose, by rocking so severely and unusually as to cause his head to come in contact with the

upright timbers, when, otherwise, there would have been clearance, to-wit, of over two feet.

At the outset of the discussion of the facts, we will eliminate the averment in the petition that the bridge timbers were too close to the track. The judge eliminated this by his charge that the decedent assumed the risk of this fixed structure and the risk of injury from its timbers being too close to trains.

Of course, the bridge remains in the case as a condition of the casualty; that is, the bridge becomes important because of the previous negligence in having a defective track, causing the engine to come too close to the bridge. We will assume that the bridge alone was all right, but the bridge became dangerous because of the negligence in having a defective track, which caused the engine to rock.

As to defendant's witnesses who did not notice the defective track at this point, we say, first, such evidence was only negative; second, the witnesses were employes and interested, and their credibility was for the jury; third, the most that can be said for the railroad is that these witnesses were in conflict with plaintiff's witnesses as to the condition of the track, and this was a jury issue.

DUTIES OF HUGHES REQUIRED HIM TO INSPECT ENGINE FROM RUNNING BOARD AND FRONT OF ENGINE WHILE IT WAS IN MOTION; WAS REQUIRED TO MAKE PRINTED REPORTS ON EACH TRIP AS TO FACTS WHICH COULD ONLY BE ASCERTAINED WHILE INSPECTING THE ENGINE IN MOTION; HUGHES WAS GIVEN NO PRINTED OR WRITTEN INSTRUCTIONS AS TO HOW TO PERFORM HIS DUTIES OTHER THAN THESE

REPORTS HE WAS REQUIRED TO FILL IN; HUGHES DID HIS WORK INDEPENDENTLY ON ENGINE AND WAS IN AUTHORITY OVER FIREMAN AND WAS NOT UNDER THE ENGINEER; CUSTOM AND PRACTICE HAD BEEN FOR TRAVELING FIREMEN TO INSPECT ENGINES WHILE IN MOTION.

This particular engine had installed on it a new kind of mechanical stoker, and the deceased was watching its operations and giving the fireman instructions (See Kemp's evidence, Record p. 58). If the smoke is black and thick, the engine is burning too much coal, and the smoke stack is one of the points which needs to be watched to see whether the engine is being fired properly (See Kemp's evidence, Record p. 58).

Hughes, in going out upon the running board, stood close to the stack and watched the smoke, and his face was turned in the direction of the smoke stack, according to Kemp (Record p. 58).

The duties of Hughes as traveling fireman were not defined by any written or printed rule. There is nothing in any written or printed rules either about employes going upon the running board or about the duties of a traveling fireman (See Record pp. 129 and 130, in examination of Ransom, master mechanic).

The only written rule ever seen about the running board was issued on May 2, 1923, addressed to engineers and firemen, according to Ransom (Record p. 130). This was after Hughes was killed.

Engineer Price testified that he saw Hughes go out upon the running board on his (Price's) side, and that when he saw

Hughes, he was looking at the smoke and looking at the machinery and looking up and all around (Record p. 134). This witness had had traveling firemen, however, to go out on the running board of his engine. They had gone out on a number of occasions (Record pp. 134 and 135).

From the cab of the engine, witness could not see the top of the smoke stack, and that is hidden from him "while in the cab by the sand box. The same thing is true of the fireman's side" (See Record p. 135).

Kemp testified that he had seen traveling firemen go out on the front end of the engine both before that time and since, and that he himself had gone on the running board while the engine was in motion to rake the sand over (Record p. 59).

The witness Kemp testified that employes frequently went out on the running board (Record p. 59).

So did the witness Price (Record p. 134).

So did the witness Finney (Record p. 65).

The witness Emmett Finney was an engineer on this road at the time of Hughes' death, and had been so for over twenty years (See the Record of Finney's testimony, beginning on p. 65).

On p. 65, he testified as follows:

> "As to how often I would have a traveling fireman on my engine, they did not have any regular time to go with a certain engineer. Sometimes I would have one twice a week, and sometimes once a month. As to what things are there at the front of the engine that a traveling fireman can inspect; things about an engine that need inspection. They can see better on the running board all the machinery, the

working part of the machinery and if there is any leak at the front end, they can see that better than from the cab of the engine."

Finney testified that the front door of the engine is too small for a fireman to get out; that in large engines the traveling fireman had to go around the caboose. There is a step on the side of the caboose and a handhold at the top provided for them to get around by. He further testified on p. 66:

"They can see the machinery far better, right up over it; here is where the machinery works, and they can see the machinery far better here than they can from the cab of the engine. The eccentrics are up there, and the steam chest, and the cylinders, and I have went out myself, and the regular fireman. The sand pipe gets stopped up, and you have to knock it open, and you have to get, sometimes, on the top of the hand rail, to rake the sand down; and then you can go around here and see the front end of the engine here, if it is not tight. It is a very large door; if it is leaking very badly, if the smoke comes out in volumes, you can see it from the cab, and when it leaks badly you can put your hand over it and feel the suction, and you could not do that from the cab. Those rods that you see on those large driving wheels, one is the main rod, and the other is the side rod. If they are knocking very badly, you can hear them from the cab. You cannot see the rods from the cab, but right up over the running-board, you can see them knock, even if they are not knocking so badly. If there is some play in the rods there—enough to enable them to thump, you can see that from the running board but you cannot from the cab. At the front end of the engine you can hear the blow from the cylinder packers. You can tell by the way the engine exhausts, how the smoke comes out, whether the cylinders are in good shape. This (illustrating) is the front door of the engine. Now this door is connected with bolts, and it tightens up. It is supposed to be absolutely air tight. If it is not, it gets into the fire box and gets the fire dirty, so it will not

steam. There is a place in the front provided for a man to get around there. He gets on what they call the beam of the pilot, and goes around on the other side. There is a way provided for him to get out clear from the cab to the running board and around the front, and on the other side back into the cab. It has got hand holds all in front there. There are steps going down from the running board to the cross-bar. If an engine is standing still, as to whether you could or not tell whether the rods are working right or not, a man can go out on an engine. When I oil my engine, if there is any bad defect in the rods, I could notice it, because the braces would stand a little bit apart. They are supposed to be jammed close up together. You could tell that if there was a large defect, but, when the engine is running, you could hear it knocking, and you could not hear nothing standing still. The best way to tell the defect is when the engine is in operation, of course. An engine cannot stand still on the track and run its drivers around unless it is jacked up."

In Finney's testimony on page 72, he testified as follows:

"As to any rule or regulation, or bulletin, order or requirement against traveling engineers and traveling firemen going out on the running board when the engine was in motion; I never seen any bulletin about that while I was there. I never heard of it; they all went out when they wanted to, with me, except on one or two occasions."

There was printed evidence as to what the duties of a traveling fireman were. That printed evidence was contained in the reports which this railway required traveling firemen to make at the end of each trip, and on every trip Hughes had taken in his short career as traveling fireman he had filled in one of these reports, and these reports appear on pages 136, 137 and 138 of the Record. These reports required the traveling fireman, among other things, to report on the condition of the throttle, the reverse lever, the braking, the boiler feeding, the lubrication, the gauge cock, cylinder packing, the valves, the

rods, the boxes, the flues, the arches, the stoker, the fire box, the fire door, the grate shaker, the front end air leaks, the quality of coal (Record pp. 136, 137).

From the testimony of engineer Finney, the traveling fireman could not possibly have made a conscientious and true report on all these conditions without going to the front end of the engine while it was in motion and inspecting conditions there (Record pp. 66 and 67).

On page 66, as to making reports on the rods of the engine, Finney testified that the rods could not be seen from the cab, but right up there over the running board you can see them knock, and if there is play in the rods it can be seen from that point. He testified that at the front end of the engine you can hear the blow from the cylinder packing (Record p. 66); that you can tell by the way the engine exhausts and how the smoke comes out whether the cylinders are in good shape (Record p. 66); that the front door of the engine, which is at the front end of the boiler is connected with bolts and is supposed to be air tight, and if it is not the engine will not steam right, and there is a place in the front provided for a man to get around there (Record p. 66).

There are steps going down from the running board to the cross bar by which a man can go across from one side of the engine to the other (Record pp. 66 and 67).

If an engine is standing still, you can not tell whether the rods are working right (Record p. 67). The best way to tell the defect is when the engine is in operation (Record p. 67).

Taking up the questions the traveling fireman was required to answer in his printed report, Finney testified that if the cylinder packing is blowing very much, you can hear it from

the cab, but if it is not blowing loud enough to hear it from the cab, a man standing over the cylinder could hear it (Record p. 67). You can best see the smoke coming out of the smoke stack right near the front of the engine (Record p. 68).

Ransom testified that if an engine was steaming well, the smoke should come out full from the top of the smoke stack and not from a portion of it only (Record p. 129).

Price, the engineer, testified that you could not see the top of the smoke stack from the cab at all (See Price's testimony, Record p. 135).

Finney testified that if the rods are slightly out of condition, you could hear them knocking and could be right over them on the running board (Record p. 68).

To see the driving boxes, right at them is the best place (Record p. 68).

There is no way in the world to tell about a cylinder packing or a valve blow unless the engine is working (Record p. 68).

As to front end air leaks, you can not tell if there is a small leak unless one gets out to the front, and the best way is to put your hand there for suction, and there is a leak that does not emit smoke (Record p. 68).

There is no way to find out about that suction if the engine is standing still (Record p. 68).

ONLY PRINTED BULLETIN IN EXISTENCE FORBIDDING ENGINEERS AND FIREMEN TO GO UPON THE RUNNING BOARD WHILE ENGINE IS IN MOTION WAS ISSUED AFTER HUGHES' DEATH; TESTIMONY OF RANSOM,

MASTER MECHANIC, THAT A SIMILAR BULLETIN HAD BEEN PRINTED AND PUT ON BOARD IN 1908 COULD NOT AFFECT HUGHES, BECAUSE IT REMAINED ON BOARD ONLY A FEW MONTHS AND HUGHES WAS NOT EMPLOYED UNTIL 1910; RANSOM'S TESTIMONY INCREDIBLE AND CONTRADICTED BY CIRCUMSTANCES IN HIS CLAIM THAT HE VERBALLY TOLD HUGHES NOT TO GO UPON RUNNING BOARD OF ENGINE IN MOTION. JURY WERE JUSTIFIED IN DISCREDITING THIS CLAIM. NOTHING IN RULE BOOK FIXING OR DEFINING DUTIES OF TRAVELING FIREMAN. LAW IS THAT RULES AND REGULATIONS OF EMPLOYER MUST BE COMMUNICATED CLEARLY TO EMPLOYE.

There was no written rule forbidding firemen and engineers from going upon the running board. The only printed bulletin order was issued after the death of Hughes (See the testimony of Ransom on pp. 128, 130). The only written rule ever seen about the running board was issued May 2, 1923, and was addressed to engineers and firemen (See testimony of Ransom, Record p. 130). As just stated, this was after Hughes had been killed in April.

Ransom claimed that he had seen a printed bulletin order forbidding firemen and engineers from going upon the running board previous to this, but could not repeat its words as it had been so long ago, but his recollection was that it was in substance the same as the one of May, 1923, and that it was issued about 1908 (See Record p. 130).

The plaintiff's contention was that this testimony of Ransom was not true; that no record appeared anywhere of this alleged

bulletin order of 1908; that Hughes was dead, and that the circumstances disproved Ransom's testimony.

Besides, a traveling fireman did not come under the description of a general fireman, and the bulletin order was addressed to engineers and firemen (Record p. 126).

Ransom's evidence further was that the bulletin order of 1908 was torn up (Record p. 130). Hughes was not employed until 1910 (Record p. 126).

Ransom only claimed that the order of 1908 stayed on the bulletin board a few months. He did not claim that any of these orders stayed on the board permanently or were among the permanent rules of the company (Record pp. 128 and 130).

It is familiar law that rules and regulations of the master, to be binding upon the employe, must be communicated to him in some clear and reasonable way.

Ransom also testified that he verbally told Hughes when he was promoted to the position of traveling fireman not to go on the running board of an engine in motion (Record p. 127).

Plaintiff below contested the truth of this statement. Hughes was dead and could not deny it. Is it not strange that this is the only rule which Ransom remembered telling Hughes about out of all the numerous things which are dangerous in railroading? Is it not strange that Ransom, after this tragedy, can only remember one warning which he gave Hughes upon his employment, and that was the one that fitted the case after this accident and there was no special reason to call Hughes' attention to it as he had never gotten in any trouble about being on the running board?

Did not the employer owe the duty to the employe, if there was any such instruction or rule, to put it in some tangible shape where there could be no dispute about it?

As to all of this testimony of Ransom about the previous bulletin order and the instruction to Hughes, it is not corroborated, and the testimony of the numerous employes was that the traveling firemen went upon the running board on their various trips while the engine was in motion, inspecting the parts of it, and we have hereinbefore shown that the only way in which this traveling fireman could perform his duty was to get upon the running board and observe the parts while in motion, and if there is a conflict between two rules, the uniform rule is that the construction must be against the master. As to the practice of traveling firemen, see the testimony of Kemp, p. 59, Price, p. 134 and Finney, p. 65.

The witness Finney, on p. 72, testified that in his long employment of over twenty years as engineer, he had never seen or heard of any rule, regulation, or bulletin order against traveling engineers and traveling firemen getting upon the running board while the engine was in motion. This was certainly some evidence against the accuracy and reliability of the memory of the witness Ransom.

Finney was employed by the railroad at the time Ransom claimed the first bulletin order was passed.

We say, therefore, that it is only a vague surmise as to whether there was any instruction and rule, and that the testimony of the interested witness who testified on the subject contained in it elements of improbability, was in conflict with the practice on the road, was in conflict with the evidence of other engineers as to there ever having been such rules or bulletin orders, and conflicted with the requirements of the traveling

fireman contained in the printed reports which he must sign at the end of each trip.

IF THE PETITIONER WAS NEGLIGENT IN RESPECT TO THE CONDITION OF ITS TRACK, AND THIS DEFECTIVE CONDITION OF TRACK CAUSED THE ENGINE TO LEAN DANGEROUSLY CLOSE TO THE BRIDGE, AND WAS ONE OF THE CAUSES OF THE DEATH OF HUGHES, EVEN IF THE JURY SHOULD FIND HUGHES GUILTY OF SOME NEGLIGENCE IN GETTING UPON THE RUNNING BOARD, THIS WOULD ONLY REDUCE THE RECOVERY AND NOT DEFEAT IT, AND THE VERDICT WAS CUT DOWN FROM $17,500 ON THE FIRST TRIAL TO $10,000 UPON THE SECOND TRIAL.

We call attention to the Act of Congress, which provides that contributory negligence shall not defeat a recovery upon the part of an employe, but that, in case of contributory negligence, damages shall be diminished in proportion to the amount of negligence attributable to the employe.

This court has held in cases too numerous to mention that the section of the Act as to the contributory negligence of the employe is operative; that it takes into account the sum total of the negligence which produced the injury; that the injured employe is chargeable with his proportion of it and that the railway company is chargeable with its proportion.

Contributory negligence is a distinct proposition from assumption of the risk.

As just stated, we have conceded that the doctrine of assumed risk applies under the Federal Employer's Liability Act; but

any mere negligence of the decedent in being out upon the engine at the wrong time, or even in violation of orders, or failing to keep a proper lookout, would be, under the Act of Congress, only contributory negligence, and would not bar recovery, but would only reduce the damages.

The decedent would not be held to have assumed the risk of the condition of the track here. In the case of Gila Valley &c. R. Co. vs. Hall, 232 U. S. p. 94, a railway employe was injured while riding on a three wheel gasoline car because of a defect in the wheel. The employe had been employed three or four days in that work riding on the car, and the court said, as there was no direct evidence that he knew of the defect, and as it was not part of his duty to inspect the machine or look after its condition, he was not chargeable with assumption of the risk. The court approved a charge in that case giving the law of assumed risk as follows:

> "The true test is not in the exercise of ordinary care to discover dangers by the employe, but whether the defect is known or plainly observable by him. An employe is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances."

In the case of Roberson vs. St. Louis Railway, 213 S. W. 873, a switchman whose death was sued for under the Federal Act, and it being impossible to say that as a matter of law he knew that a car protruded from a track for such a distance as to render it unsafe to attempt to pass between that car and a moving car on another track, held not to have assumed the risk of injury from being crushed between the cars, but at most guilty of contributory negligence diminishing damages. See the case of Roberson vs. St. Louis Railway, 213 S. W. 873.

In the case of Authement vs. Louisiana Western R. Co., reported in 86 Southern Reporter, 215, from Louisiana, headnote 3 reads thus:

> "Where a brakeman having switched a car on a siding, called the conductor's attention to the fact that it was too close to the other track, the conductor telling him to leave the car where it was, and on the following morning while riding on another car, without looking towards the stationary car, was brushed off, he did not assume the risk of injury from contact with the stationary car, though he forgot the danger and failed to guard against it, but he was guilty of contributory negligence within the Federal Employer's Liability Act, if his conduct was not justified by his duty to obey the orders of his superior."

On page 216 of this decision, in 86 Southern, the court says:

> "The doctrine of assumption of risk is not appropriate to this case. The plaintiff's forgetting the danger, or failing to guard against it, was not a deliberate assumption of risk. It was contributory negligence, if in fact it was not justified by the duty which the brakeman owed to obey the orders and act upon the judgment of his superior."

A strong case is the case of Anzolotti vs. McAdoo, 262 Fed. 568, from New York, in which a longshoreman was pushing sacks of flour down some skids on a truck across a pathway hidden by cotton bales on which other trucks going in a right angular direction were pushed. Oblivious of the danger of colliding with another truck, and forgetting it for the moment, he started at too high a speed and could not stop before getting into the track pursued by the other trucks, and collided with one of them. It was contended by the defendant that he had assumed the risk of another truck being on the other pathway. The United States District Court held that it was not a case of assumption of the risk, but that the collision occurred simply by his negligence in forgetting and in going down the pathway

too fast, and in not taking proper precautions to avoid the danger. The court, on page 570, said:

> "Further, I may assume that in order to establish an assumption of risk, the servant need not be faced with a choice between throwing up the work or losing all right of recovery. If a remedy for the danger is at hand, and he fails to use it, his inaction may be evidence of assumption. Yet, if the doctrine of contributory negligence is to remain at all, I think we must interpret language like that of Justice Day in 220 U. S. 590, as meaning that the precautions which the servant omits, when he contributes negligently to the injury, are choices required of him only in the discharge of the duties imposed upon him, and not precautions which call upon him to do something outside. At any rate, without attempting any exhaustive definition, it appears to be quite safe to say that when the injury arises from a failure to choose correctly between two ways of discharging those duties, one of which is safe and the other hazardous, the servant has not assumed the risk but has negligently contributed to the injury. This may not be the final line between the notions; but, if not, I believe it safely excludes all cases of assumption of risk, unless that idea is to absorb the other altogether."

The rules of a railroad company are construed most strictly against the company, and liberally in favor of the employe. See Western & Atlantic Railroad vs. Bussey, 95 Ga. 584, headnotes 2, 3, 4, 5 and 6.

Where a locomotive engineer was killed while operating his locomotive at high speed, imprudently, negligently, or even contrary to a rule of the road, for his governance, that fact did not bar him from recovery under the Federal Employer's Liability Act, but only went to mitigation of the damages. L. & N. R. R. vs. Fleming, 69 So. Rep. 125.

In the case of San Pedro, L. A. & S. L. R. Co. vs. Brown, 258 Fed. Rep. 806, it was held that, under the Federal Em-

ployer's Liability Act, the negligence of a car inspector of an interstate carrier, in failure to place a blue flag at the end of a string of cars before making an inspection, pursuant to a rule of the company, or his failure to have his co-worker, an inspector, to place such flag, was not such negligence as would bar a recovery, but was such as, if proven, would merely mitigate damages.

In the case of St. Louis, I. M. & S. Ry. Co. v. Conley, 187 Fed. Rep. 949, the plaintiff alleged that the railroad company had constructed a railroad tunnel through which its road extended; that near the center of the tunnel the railroad company carelessly and negligently erected and maintained upright posts of timber, known as "batter posts," so near and within such close proximity to the railroad track that they rendered the operation of its engines and trains over the track at such place hazardous, unsafe, and dangerous to its employes while in the discharge of their duty; that Conley was in the discharge of his duty as engineer of a freight train, and while the engine was passing the upright timbers, or "batter posts," he was struck upon his head by one of them, on account of the negligence and carelessness of the defendant railroad company, and by reason of the upright timbers being too close and within dangerous proximity to the track, and that he received injuries resulting in his death.

In the fourth paragraph of the decision, the court says:

> "It is said that Conley was familiar with the tunnel, and the testimony of a number of expert witnesses on the part of both the plaintiff and defendant tended to show that, because of the swaying motion of the engine running over a rough track, it was impossible to ascertain the distance structures were from the track with any degree of accuracy, even in the day time, and the conditions here were much less favorable. In addition to this, as shown

by the condition of the engine after coming out of the tunnel, an emergency had arisen which required the engineer's immediate attention."

In the case of Missouri, K. & T. Ry. Co. of Texas vs. Williams, 103 Tex. 228, 125 S. W. 881, affirming a Texas case in 117 S. W. 1043, the above case also being quoted in Neg. and Com. Cases, Vol. 14, page 20, the court holds (our quotation being from 14 Negl. & Compensation Cases, p, 20):

"In an action against a railroad company by the widow and children of an engineer killed by striking his head against the extended arm of a mail crane, as he was looking out of the cab window, in an ordinarily careful manner, to observe the working of the injector of the engine, the evidence tended to show that the longer arm of the crane, when lowered to the horizontal position in which it rested when holding a bag, extended to a point which left between its iron end and the cab of a passing freight engine, when the track was in good repair, a clearance of but 9¾ inches. There was testimony to the effect that the crane would have served its purpose equally well in a location somewhat further from the track. There was evidence also of a defective condition of the track at that point, in consequence of which the engine swayed an unusual distance, rendering the actual clearance a few inches less. It was not usual for the crane to be in use as freight trains passed, but on this occasion the passenger train for whose picking up the bag had been put in position, was late, and when the decedent's freight train pulled by, ahead of the overdue passenger train, the bag had not been removed. The negligence alleged in the complaint was (1) the maintaining of the crane too close to the track, and (2) the permitting of the defective condition of the track. In affirming the decision by the court of civil appeals, sustaining a judgment for plaintiffs for $25,000, the supreme court held, with respect to the crane, that the evidence was clearly sufficient to take the case to the jury upon the issue of the defendant's negligence causing the death. It having been urged in argument that without

evidence from experts in crane construction the jury could not competently have found that the crane was not constructed in a place and manner proper, or even necessary, to its use, the court held that if there was a reason hidden from the ordinary person why the crane should have been just where it was, the burden at the trial had rested upon the defendant to bring that reason before the jury, since in themselves the circumstances here indicated negligence sufficiently to raise a presumption thereof that placed on the defendant a burden of explanation. The Supreme Court said: 'The occurrence itself is sufficiently indicative of negligence on the defendant's part to call for an explanation from it, freeing it from such imputation. The killing of one of its employes while in the proper performance of his duty, by contact with a structure of its own contrivance near the track, strongly indicates a lack of proper care and foresight in the location of the structure, in view of the reasonable presumption that it could have been made consistent with the safety of employes while rendering the ordinary service.' A similar view was taken with reference to the defective condition of the track."

The case just quoted from Texas seems to be practically the case at bar in all particulars. There was a defective condition of the track which caused the engine to sway an unusual distance, rendering the actual clearance of the crane a less distance than it would have been had the engine not swayed. The negligence complained of in that case was, first, the maintenance of the crane too close to the track, and, secondly, *the permitting of the defective condition of the track.*

We also refer to the case of St. Louis &c. Ry. Co. vs. Conley, 187 Fed. 949, hereinbefore quoted, where there were batter posts close to the track, and where there was a rough track, which caused the engine to sway unusually, causing Conley to be stricken by one of the posts.

We thus have it established that merely to violate a rule is not ordinarily anything but contributory negligence. To be at the wrong place on an engine is ordinarily only contributory negligence. The courts have even held that, where a rule required a car inspector to put up a blue flag, that the failure to have the flag up is only contributory negligence. In all these cases, the employe can recover, if the defendant's negligence, in the language of the congressional enactment, in part caused the injury. That keeping in memory the close timbers of a bridge is a matter of ordinary prudence, and the failure to do so is only a matter of contributory negligence, see Authement vs. Louisiana Western R. Co., 86 So. 215; Anzolotti vs. McAdoo, 262 Fed. 568.

That violating a rule of a company goes only in mitigation of damages under the congressional enactment, see Louisville & N. R. Co. vs. Fleming, 69 So. 125; San Pedro &c. R. Co. vs. Brown, 258 Fed. 806.

All railroading is dangerous, and merely to be in a dangerous place, as on the foot board of an engine, is not necessarily negligence. See A. K. & N. R. R. vs. Tilson, 131 Ga. 401.

That the defects in the track were actionable as to Hughes, there can be no doubt. He was not required to inspect or keep up with the track; neither did he assume the risk of injury from the negligence of co-employes.

The act of Congress is very much like our Georgia law as to recovery for the negligence of co-employes, and it has been repeatedly held that an employe did not assume the risk of injury from the negligence of another employe. See the case of Southern Ry. vs. Davis, 15 Ga. App. 739.

In Atlanta Ry. vs. McManus, 1 Ga. App. 308, the court said:

> "The employe of a railway company does not assume the risk of injury from the negligence of his co-employes."

That, under the Act of Congress, an employe does not assume the risk of injury from negligence of a fellow servant, see the numerous cases cited on page 2759 of Vol. 3 of Annotations, 1923 Supplement of U. S. Compiled Statutes.

HUGHES WAS ONLY CONCERNED WITH THE MECHANICS OF THE ENGINE, HAD NO DUTY TO PERFORM IN RELATION TO THE TRACK, AND, IN THE ABSENCE OF EVIDENCE SHOWING THAT HE KNEW, OR MUST HAVE KNOWN, OF THE DEFECTIVE CONDITION OF THIS TRACK, COULD NOT BE CHARGED WITH ASSUMPTION OF THE RISK ON ACCOUNT THEREOF.

This decedent was under no duty to inspect the track. He could well assume that the track was kept in safe condition. Merely because he ran over it, he was not charged with such knowledge of it as the section foreman and track men were charged with. He used the track only in riding on the engine.

The case is very analogous in the underlying principles to that of Wilson vs. Atlanta, 63 Ga. 294, in which Judge Bleckley called attention to the fact that the duty on a city of maintaining a street in safe condition, though limited to ordinary diligence, was very different from the case of foot travelers using a street, who were likewise limited to ordinary diligence; that the same standard of care, though applicable to both, might make the city authorities negligent, while the foot traveler, not having the same duty of inspection, would not be negligent; that using a

street would not imply the same degree of foresight, care and knowledge as would the duty of keeping that street in a proper and safe condition.

Railroad employes do not assume the risk of injury from defective appliances. See Lloyd vs. Southern Ry. Co., 81 S. E., 1003; Sears vs. Atlantic Coast Line R. Co., 86 S. E. 176. Certainly the track comes under the same classification as defective appliances.

An employe does not assume the risk of injury from defendant's failure to properly maintain a lighting system in its yards. Kirbo vs. Southern Ry. Co., 84 S. E. 491.

A locomotive fireman is not chargeable with knowledge of the condition of the ties because he frequently rode over the track and occasionally walked over it. See the Wilson case, 212 Ill. App. 271.

Even where a structure by the side of a track was held to be such a fixed structure as to charge the engineer with assumption of the risk when his engine passed through it, the court was cautious enough to guard its language by saying:

> "and that the engine did not sway more than ordinarily."

See McDougall vs. Atchison &c. Ry. Co., 186 Pac. 1028.

No affirmative duty of inspection is required of a railroad employe to see whether there are defects in appliances. See Chicago &c Ry. Co. vs. Payne, 217 S. W. 810.

The employe may assume that the employer has exercised ordinary care in providing a safe place to work and suitable appliances. Ft. Worth &c Ry. Co. vs. Smithers, 228 S. W. 637.

That engineers, firemen and train hands injured because of defective conditions of track can ordinarily recover, and ordinarily do not assume the risk of such condition, is held in numerous cases, among them the following: Shugart vs. A. K. & N., 133 Fed. 505; Galveston, etc. vs. Thompson, 116 S. W. 106; Jones vs. Wilson, 79 S. C. 69; Lincoln vs. Central, etc. R. R., 82 Vt. 187.

That a casualty occurring from a defective track is not one of the ordinary perils which an engineer voluntarily assumes in taking service with the company is held in Baltimore, etc. R. R. vs. Taylor, 186 Fed. 828.

On the general subject that engineers, firemen and train hands do not ordinarily assume the risk of defects existing in the rails and ties of the track over which they run, see the case of Smith vs. Chicago, etc. R. R., 82 Kan. 136, and the elaborate note to this case in 28 LRA N. S. p. 1255, in which scores of cases hold that the trainmen do not assume the risk of defective tracks, and the cream of the doctrine is thus stated in this note in 28 LRA N. S. on page 1256 as follows:

> "The general rule asserted by practically all of the cases cited below, and not repudiated by any, is that a trainman has a right to assume that the track and road bed are safe; that it is not his duty to make an investigation in order to discover defects, and, in the absence of any knowledge, actual or constructive, of the defects, he will not be held to have assumed the risk thereof;"

and scores of cases hold that knowledge of defects in the road bed is not inferable from the mere fact that the servant runs trains over them, and we quote from this note as follows:

> "The risk of injury from a defect in a track, negligently permitted to remain unrepaired, is not one of the risks of the services assumed by a conductor (citing cases), and

a knowledge of defects in a road bed is not inferable from the mere fact that the servant had been accustomed to running trains over it."

RECOVERY IN THIS CASE WAS BASED UPON NEGLIGENCE AS TO CONDITION OF TRACK; JUDGE CHARGED JURY FULLY ELIMINATING CLOSENESS OF BRIDGE ALONE AS AN ACTIONABLE DEFECT. JUDGE CHARGED JURY FULLY ON ASSUMPTION OF RISK AS TO ALL PHASES OF THE CASE.

The recovery in this case was based upon the condition of the track, and that condition was shown by witnesses to have been defective, both before this injury and immediately after.

That defect in the track consisted in low joints at two places within a few feet of the entrance to this bridge, which caused an engine to rock unduly. Trainmen are not charged with knowledge of the condition of the track, unless it is brought home to them in some way, and it is not assumption of the risk as to them unless trainmen either knew it or, in the exercise of ordinary care, should have been charged with knowledge of it; and the judge in the court below charged fully upon the doctrine of assumption of the risk. See the charge of the court on pages 153 and 154, in which the judge used the following language:

> "This act further provides that in all actions brought against any railroad under any of the provisions of this act to recover damages for the death of an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

"The court instructs you that there are certain risks of an employment which an employe assumes in entering the employment, and if the injury results from some of these assumed risks, then there is no liability for such injury on the part of the employer. An employe assumes the risks of such dangers as are normally and necessarily incident to the occupation, whether he is aware of them or not. A risk of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work or suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and recognized them.

"An employe does not, however, assume the risk of conditions of which he is not aware, or of which in the exercise of ordinary care, he could not have discovered.

"The court instructs you that the fact of an accident to an employe carries with it no presumption of negligence; and it is an affirmative fact for the plaintiff to establish that the employer has been guilty of the negligence as alleged. It is not sufficient for the plaintiff to show that the defendant may have been guilty of such negligence; the evidence must point to the fact that it was; and where the testimony leaves the matter uncertain it is not for the jury to guess as to the existence of such negligence and find that the negligence of the defendant was the real cause of the disaster if there is no satisfactory foundation for such conclusion. On that question, gentlemen, you will apply the rule of the greater weight of preponderance of the evidence, as I have previously defined it to you, and on all questions of fact you will apply that rule of the greater weight of preponderance of the evidence."

The judge was clear in telling the jury, as matter of law, that the decedent assumed the risk from the bridge, in the

following language on page 154, as well as in the language hereinbefore quoted, to-wit:

> "The court instructs you that, so far as the bridge alone is concerned, it was a fixed structure upon the defendant's line of track, and that the decedent would have assumed the risk of any injury which was due to the bridge alone.
>
> "The court instructs you that it is not sufficient to relieve a servant from assumption of risk as to the proximity of permanent structures on his master's premises that he may not actually know the distance of such structures from the place where he is accustomed to work. If such a structure, or portions thereof, as for instance a railroad bridge, within the observation of a man of ordinary care, is so near to the side of an engine passing into the bridge, which engine is itself no wider than those on which the servant has been accustomed to pass through the bridge, as to make it unsafe for him to be with his body or portion thereof extending beyond the outer edge of the engine, then the servant assumes the risk of being so, though he, himself, may not actually know the width of the bridge or the distance of such portion of the bridge from the engine or track. He not only must not actually know but he is chargeable with a knowledge of the peril if plainly observable."

The judge left it to the jury as to whether the decedent was or was not negligent in knowing of the defective part of the track, and we submit that this was a jury question. There was not a particle of proof that the decedent knew of the defective condition of the track, or should have known of it. Inspection of the track was not part of his duty. It was not even his duty to run the engine, for that belonged to the engineer. His duty only pertained to inspection of the mechanism of the engine, to-wit, keeping it hot. On this subject, the judge charged the jury as follows (See Record pp. 154, 155):

> "The court instructs you that if the defendant was negligent in respect to the condition of its track, and

if you find that the decedent was not chargeable with negligence in not knowing the condition of the defendant's track, if it was a defective and dangerous condition, and if you find that the defective condition of the track, being negligence as just stated, caused the engine to rock or tilt from side to side, as alleged in the petition, and if you find that this condition of the track causing this rocking or tilting of the engine was the cause of the decedent coming in contact with the timbers of the bridge, as alleged in the petition, or was the cause of the decedent being thrown from the running board of the engine, as alleged in another count of the petition, and if the plaintiff's negligence, if he was negligent, was not the sole and only cause of his death, then and in such event the plaintiff would be entitled to recover in this case.

"You are instructed that under the Act of Congress it was the duty of the defendant to exercise ordinary care to keep its track and road bed in proper condition and that if, because of any defect or insufficiency due to the defendant's negligence in its tracks or road bed, any employe is killed, that then the personal representative of such employe may maintain an action and recover such damages as, under the law, might be assessed under instructions to be hereafter given you."

THE PETITION FOR CERTIORARI CLAIMS THAT PLAINTIFF AND HER WITNESSES AS TO THE CONDITION OF TRACK ARE NOT EXPERTS; OUR REPLY IS THAT PLAINTIFF AND HER WITNESSES WHO TESTIFIED AS TO THE CONDITION OF TRACK TESTIFIED TO FACTS WHICH ANY LAYMAN COULD SEE AND OBSERVE; TESTIFIED AS TO ACTUAL PHYSICAL EFFECT OF DEFECTIVE JOINTS IN TRACK AS MAKING ENGINES SWAY AND ROCK WHICH DID NOT SWAY OR ROCK BEFORE; TESTIFIED TO ACTUAL

NEARNESS OF ENGINE IN ITS SWAYING MOTION TO SIDES OF BRIDGE; AND THAT BASED UPON SUCH TESTIMONY, DEFENDANT'S EXPERT MASTER MECHANIC ADMITTED THE CONDITION WAS DANGEROUS.

In the argument for defendant in error, beginning on page 19, it is claimed that the evidence of plaintiff and her witnesses who testified that the track gave from three to four and five inches and that the engine actually rocked until it came within a few inches of the side of the bridge on entering the same, is not entitled to weight, because the plaintiff and the other witnesses were not experts, and that tracks are supposed to give some.

In the first place, we say that the plaintiff and these witnesses did not testify to conclusions, but testified to facts. We have already quoted their testimony showing that there were two low joints in this track and that when the train struck the joints the track gave and the train began to rock.

The plaintiff testified, in addition to what we have quoted hereinbefore from her other witnesses, on page 52 of the Record as follows:

> "I observed the effect that the engine had as it went over that crossing at that place; it gave down; I saw that. The track gave down at that point 4 or 5 inches. The effect it had on the locomotive of that train was that it started it to rocking. I had not observed it rocking before that. I observed another low place just before you get to the bridge on the left hand side coming to Atlanta, and I observed the train as it hit it and observed it knocking the water and mud from under the track; it knocked the mud out and the ballast was all gone from

> this low place, all washed down, you know, under the ties. The ballast was worn out and it knocked the mud and water from under that place. After the engine, in approaching that bridge, struck these low places in the track it had a rocking motion; I could see it rock. That bridge has upright pieces and it looked to me like the engine, in its rocking motion, came awfully close to the side pieces of that bridge; I would say about 6 or 8 inches; that would be my judgment."

So plaintiff and her witnesses were not testifying to conclusions, but were testifying to things which they saw. This witness saw the engine approach these low places, and did not observe it rocking or swaying. When it struck these low places, it began to rock and the rocking motion continued as it entered the bridge, making the cab of the engine come dangerously close to the side of the bridge.

Certainly, a lay witness can testify to facts. It may be conceded that there is some slight give to a track at a joint, perhaps a quarter or a half inch, but no one will contend that for a track to give all the way from two to five inches is slight, and no one can contend that a low joint which causes an engine to rock when it did not rock before, and which causes it to rock so that it comes within something like six inches of the sides of a bridge, when normally it ought to clear it over two feet, is doing the usual and normal thing for an engine on normal and proper track. The expert evidence all tends to show that if the facts testified to by these lay witnesses were true, the track was in bad condition. The engineer, Finney, who had had long experience, on page 69 of the Record testified:

> "As to the effect of a low joint in the track, where there is mud under it, where it is soft, where the tie gives, it causes the engine to rock from side to side, each way. I have had that experience many a time; I have been derailed several times from that effect, I thought that was

> the cause. As to what extent should a low joint make an engine rock, it is according to how bad the shock is; the greater the shock, the more danger. I think it will make a larger engine rock more than a smaller one. The greatest part of the rocking is at the top."

That a track, which gave way as much as the defendant's track was shown to have given by the witnesses we have quoted, was in an extremely dangerous condition is shown by the defendant's expert and master mechanic, Ransom, who on pages 128 and 129 testified as follows:

> "The effect on an engine running along, if the track should give away on one side with the engine on it from four to five inches and some 30 or 40 feet further on on the other side should give away from four to five inches, just before entering a bridge, that bridge would have to be pretty wide if you got through it. Only a miracle would keep it from being derailed."

Again, on page 129 of the Record, Ransom, the defendant's master mechanic and expert, testified as follows:

> "Yes, the rougher the track the more it is liable to rock. As to there being a great deal more rocking on these rough side tracks that are not as well ballasted as the main line, if you get up the same speed they will, but the speed is very low. There is a principle on which you can figure, if a car body is let down one, two or three inches, as to how much that would project over. The rule is about three to one; that is my recollection of it. Yes, the effort in making these vehicles is to try to overcome that as much as possible. No, you would not want a track with a low joint in it."

Thus, we see that with an object as high as a car or the cab of an engine, if the body of the engine is let down one, two or three inches, the top would project over about three times that much. Of course, the projection over is dependent, first, upon

the depth of the depression and the height of the object supposed to project over. Thus, if there were a five inch give, there would be a fifteen inch projection over on one side at the top. If there were a four inch depression, there would be a foot projection over at the top, etc.

The argument lays stress on the fact that Kemp, the fireman on this engine, was the plaintiff's chief witness. We deny this. He was only the plaintiff's witness from the necessity of having to put him up to prove the circumstances surrounding the killing.

The argument claims that all of the experts swore that the track was in perfect condition. We deny this. We say that the defendant's experts giving an opinion based upon the evidence of the plaintiff's witnesses showed that this track was dangerous, as we have just shown.

On page 20 of the brief, the defendant claims that there is only a scintilla of evidence for the plaintiff. We think we have shown that numerous witnesses testified to actual facts showing a bad condition of the track and showing the actual physical effect of that track on trains, and that the defendant's experts testified that if these facts were true, the track was in bad condition.

It is not to be presumed that the plaintiff, in cases of this sort, can make witnesses of the defendant's track men who are charged with responsibility for keeping up the track. Naturally, employes charged with this duty would make every effort to exonerate themselves. At least, their interest is always for the consideration of the jury, and a jury is not bound to take the opinions of track men as to the condition of the track against witnesses testifying to actual facts, and against photographs, and against the actual physical effect of that track on trains.

Under heading (b) on page 20 of the brief, the defendant claims that the plaintiff's case is made out by the guess of novices on technical matters against the judgment of informed experts, and it is claimed that all the experts, the men who actually built and inspected the track, agreed that it was in perfect condition.

These experts conflicted with the plaintiff's testimony. The credibility of these experts, under these circumstances, was for the jury. This is no question of the case of a novice, as the defendant's brief claims. It is the case of the testimony of several witnesses as to absolute facts, visible to the eye, and as to the actual effect of the condition of a track on trains which passed there.

AS TO CLAIM THAT VERDICT SHOULD HAVE BEEN DIRECTED FOR DEFENDANT, WE SAY THAT IN THE FEDERAL AS WELL AS IN THE STATE COURTS, UNDER THIS EVIDENCE, THE CASE WAS FOR THE JURY; AT THE SAME TIME, ALL THE RULES OF PRACTICE IN FEDERAL COURT CAN NOT BE TRANSPLANTED TO THE STATE COURT MERELY BECAUSE A RIGHT ARISING UNDER A FEDERAL STATUTE IS ASSERTED.

Under heading (c) in the brief on page 21 counsel for defendant contend that a verdict should have been directed for the railroad, and take the position that even in state courts, under the Federal Employer's Liability Act, a verdict should be directed not in accordance with state practice, but in accordance with the Federal rule.

We respectfully contend that in the Federal courts, as well as in the State courts, the trial judge would have had to

submit this case to the jury upon the condition of this track, and upon whether these witnesses who testified to the facts in connection with it, corroborated by the photographs, were testifying to the truth. That their testimony conflicted with certain expert witnesses can make no difference. As we have hereinbefore shown, the defendant's expert, Ransom basing his opinion on the facts testified to by the plaintiff's witnesses, characterized the track as being in a condition likely to even derail a train.

We do not understand that when a plaintiff brings a case in the state court under the Federal Employer's Liability Act that the rules of practice of the Federal court govern.

Where the state law forbids it, a state judge could not express his opinion on the facts in a case under this act.

Pleadings are drawn and the jury are stricken under the rules of procedure in the state court.

It is impossible to transplant all the rules of practice into the state court from the Federal court, just because the right of action is governed by a Federal statute. The trial, the weight to be given the testimony, the functions of judge and jury are all matters which pertain to the remedy, and in all matters relating to the remedy the law which created the trial court governs, and not the other laws of the jurisdiction which give the right.

The case of Gulf &c. Ry. vs. Wells, 48 Supreme Court Rep. 151 (72 L. ed. 152) quoted by petitioner, merely held that where a brakeman attempting to get on a train after it had started testified that the engine gave an unusual jerk, when he was ten cars away from the engine, could not establish negligence, where the engineer did not know that the brakeman was

attempting to get on the train after it had started, and where the brakeman's statement was necessarily a mere conjecture arising from the fact that he could not see what occurred on the engine, and that his opinion was not of sufficient weight to carry the matter to the jury.

This case goes very far from holding that the trial judge in a state court must adopt all the rules applicable in the Federal trial courts in cases under the Federal Employer's Liability Act.

The case of Chicago &c R. R. vs. Coogan, 271 U. S. 472, merely holds that it is the duty of the trial judge to direct a verdict for one of the parties where the testimony "and all the inferences which the jury may reasonably draw therefrom would be insufficient to support a different finding."

This is the rule in Georgia and everywhere else, so far as we know. It is not a rule peculiarly applicable to the Federal courts.

The Code of Georgia, section 5926, provides as follows:

> "Where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto."

We do not understand that this rule is, in any material way, different from the Federal rule.

True, in the Federal courts, the judge may express his opinion on the facts, while in Georgia and most of the other States, he can not do so.

The case cited of Small Co. vs. Lamborn, 267 U. S. 248, was a case from a district court of the United States.

The case of Barrett vs. Virginian Ry., 250 U. S. 473, was likewise a case carried up from a district court of the United States.

The case of Central Vermont Ry. vs. White, 238 U. S. 507, merely holds that the question of the burden of proof respecting contributory negligence in a suit in a state court under the Federal Employer's Liability Act is to be determined according to the rules in the Federal courts, which placed the burden on the defendants, and not according to any local rule of procedure which imposes that burden on the plaintiff. That question is in no way involved in this case. There are certain rules of the state court which, of course, do not apply in cases under the Federal Employer's Liability Act. In Georgia, there is a presumption against a railway company where a person is injured by the running of trains, which in certain instances, where freedom from fault appears, applies to employes. Of course, this rule does not apply to cases in the state court under the Federal Employer's Liability Act, and the judge below, in his charge, was careful to tell the jury that the burden of proof was on the plaintiff to make out her case by a preponderance of the testimony (See Record p. 150).

PETITION FOR CERTIORARI CLAIMS THAT EVIDENCE SHOULD HAVE BEEN INTRODUCED SHOWING JURY METHOD OF REDUCING PAYMENTS TO PRESENT CASH VALUE AND THAT PREVAILING INTEREST RATES SHOULD HAVE BEEN SHOWN BY EVIDENCE. AS MATTER OF FACT, PLAINTIFF INTRODUCED THE CARLISLE MORTALITY TABLE SHOWING EXPECTANCY OF LIVES, AND DEFENDANT INTRODUCED THE ANNUITY TABLE SHOWING VALUE OF ANNUI-

TIES OF $1.00 AT INTEREST RATES OF 6% AND 7%, WHICH, UNDER DECISION IN CHESAPEAKE & OHIO VS. KELLY, 241 U. S. 485, IS ONE OF THE METHODS OF PROVING HOW TO REDUCE SUM TO PRESENT VALUE.

The claim is made in the petition for certiorari on pages 16, 18 and 24 that evidence should have been introduced showing the jury how to make a mathematical calculation by which future payments may be reduced to their present cash value, and that there should also have been some evidence on the actual rate of interest on money.

The facts do not bear out this contention. The plaintiff introduced (after showing the earnings and value of services of decedent and his age and health and strength, as hereinbefore stated) the Carlisle Mortality Table, which showed a person of the decedent's age, thirty-four, to have an expectancy in life of 31.68, and which also showed the expectancy of the wife and son at their proved ages (Record p. 138).

The defendant introduced the Carlisle Annuity Table showing the value of annuities of $1.00 on single lives according to the Carlisle Mortality Table, and the defendant, in introducing that table, selected two rates of interest, to-wit, the 6% and the 7% rates (See Record pp. 139, 140 and 141).

According to the Kelly decision, supra, and the current of authorities, the prevailing way of proving (if it is considered necessary to prove, which we deny) the process of reducing a sum to the present cash value is to introduce these annuity tables at given ages and at given rates of interest. See also Florida &c. R. R. vs. Burney, 98 Ga. p. 1.

The defendant, by selecting and putting before the jury the 6% and the 7% rates of interest, certainly must be considered in the attitude of claiming that those rates of interest are applicable and that the jury would be authorized to use one or the other of them. Moreover, 7% is the legal rate of interest in Georgia, and, under Georgia decisions as to cases arising under Georgia law, the 7% or legal rate is used in making this discount. See Florida &c. R. R. vs. Burney, 98 Ga. 1.

But, as has been held by this court in the Kelly case, supra, the legal rate in the State is not necessarily the rate of discount. The trial judge recognized fully that the legal rate in the State was not the rate to bind the jury, and he left the rate of interest to the jury, under proper instructions.

The judge told the jury in his charge on pages 161 and 162:

> "When you decide upon the amount of the pecuniary benefits which the decedent's life would have been to his wife and also to his child, under the conditions heretofore stated, if any, it would not be proper to give the gross amount of these benefits in the verdict which you would render in this case, because, in as much as the sum is paid down all in cash, the amount would have to be reduced to its present cash value.
>
> "You are instructed that the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowances according to the circumstances for the earning power of money, is the proper measure of damages in an action of this character.
>
> "It is a question for you to decide, under all of the circumstances of the case and under all conditions which might be present, as to what rate of interest you would use in making a discount of the future value of the decedent's life to his wife and child to its present cash value. Local conditions are not to be disregarded, nor should the dis-

count necessarily be at what is called the legal rate of interest. It is a matter for the jury to decide as to what the earning power of money at this place, and at this time, and under all the conditions which are here present, would be.

"You are authorized to make the calculations reducing these sums found by you, if any, to their present value by any proper mathematical calculation. In other words, whatever the annual loss of these beneficiaries might be throughout the expectancy of the decedent, or throughout such part of his expectancy as you decide that these beneficiaries should receive the benefits—the sum would be reduced to its present cash value upon the rate of interest which you fix as reasonable, just and right under all of the circumstances."

Of course the jury, in making their proper mathematical calculation, could use the annuity tables introduced, if they adopted those rates of interest, and these annuity tables were introduced by the defendant. In Georgia, as we shall hereinafter show, even had no tables been introduced in evidence, it is the practice in that State to presume that the jury can make a calculation reducing a sum to its present cash value, just as they could multiply, add, subtract, or divide. The calculation is only a little more advanced one, and it is no violent presumption that any average jury could make it.

Suppose we take the decedent's contributions to wife and child at the low and conservative figure of $1,200 per annum. The Carlisle Annuity Table introduced by the petitioner in certiorari (defendant below), under the 6% column, shows that an annuity of $1.00 in favor of a man thirty-four years of age is worth 12.675, and, on the basis of 7% (which is the legal rate in Georgia) is worth 11.374. Thus, the exact method of reducing to present value was before the jury, at least to the extent of the rates of interest introduced before the jury by

the defendant. Thus, taking the contributions to the next of kin to be $1,200 a year, and multiplying by the figure under the 6% column, we get considerably more than the verdict found, to-wit, $15,210.00, while the verdict was for only $10,000.00. If we use the 7% table introduced by the defendant, it would still make the verdict more than the amount found by the jury. The defendant, by introducing this method of calculation as to both 6% and 7%, certainly must be placed in the attitude of contending that these rates of interest could properly be used by the jury in reducing to their present cash value.

BUT EVEN HAD THERE BEEN NO PROOF AS TO THE METHOD OF REDUCING FUTURE PAYMENTS TO PRESENT WORTH, AND EVEN HAD THERE BEEN NO EVIDENCE AS TO PREVAILING RATES OF INTEREST, THIS CALCULATION AND THESE RATES ARE MATTERS OF COMMON KNOWLEDGE, AS TO WHICH NO PROOF IS NEEDED, AND THE COURT COULD HAVE PROPERLY LEFT THEM TO THE JURY WITHOUT ANY PROOF WHATEVER. MOREOVER, THE QUESTIONS ARE NOT PROPERLY MADE IN THIS CASE.

We do not think that such questions as to present worth calculations and interest rates have been made in this Record. The practice in Georgia is to make the specifications of error in the motion for new trial, and the case goes to the appellate courts on those specifications. The claims made on page 32 and ending on page 35 of the Record do not, we contend, make any such claims as are argued in the brief, except in the most vague and general way.

There was plenty of evidence to authorize the jury to find the value of Hughes' life to the beneficiaries, who were wife and

child. The amount of earnings which Hughes received was shown by the testimony (See Record p. 50). The amount which Hughes contributed to his wife and child and the services which he rendered them were fully shown (Record pp. 50 and 51).

The judge charged fully the correct rule as to damages, charging the jury that the measure of damages was the financial benefit in a pecuniary way to the widow and child which would probably have resulted from the continued life of the decedent had he lived. The judge went fully into the subject, and consumed pages 160, 161, 162 and part of 163 of the Record upon the subject. He charged upon the mortality tables. He told the jury that it was finally upon them to fix the expectancy in life of the various parties. He charged fully that when the jury decided upon the amount of the pecuniary benefit which the decedent's life would have been worth to the wife and child, that it would not be proper to give the gross amount of these benefits, but the sum would have to be reduced to its present cash value (Record pp. 161 and 162). He charged that the present cash value of future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowances according to the circumstances for the earning power of money, was the proper measure of damages. He told the jury that in deciding, under all the circumstances and under all conditions which might be present, as to what rate of interest the jury would use in making a discount of the future value of decedent's life, that local conditions were not to be disregarded, nor should the discount necessarily be at what is called the legal rate of interest, and that the jury were authorized to make the calculations reducing these sums to their present value by any proper mathematical calculation. He told the jury that in estimating earnings of a man, they should take all these things into consideration: feebleness of health, actual sickness, the loss of employment, reduction in wages and all other things for which a proper allowance might be made (Record p. 162).

In Chesapeake & Ohio vs. Kelly, 241 U. S. on pp. 490 and 491, the Supreme Court held that the discount should not be necessarily made at what is called the legal rate, and that the award should be made upon a basis that did not call on the beneficiaries to exercise skill and financial experience. The court went ahead in that case and said it was not called on to lay down any precise rule or formula, and the court was aware that it might be a difficult proposition for the ordinary juryman to calculate the rate upon deferred payments, with annual rests, and reach a present cash value, and did not decide how the question should be met further than saying:

> "Like other questions of procedure and evidence, it is to be determined according to the law of the forum."

This language is on page 491.

The law of the forum was decided by the Court of Appeals of Georgia and the Supreme Court of Georgia in this very case, and that law is that it is left to the jury, as the judge did in this case.

We do not agree that there is any difficulty in this proposition for the average juryman. In this day of intelligence and commerce, nearly any ordinary business man can make a reduction of this sort. It is only a little more advanced calculation than addition, multiplication, division, the calculation of interest, or the like, and all such questions which are considered to pertain to the ordinary knowledge of the citizen are left to the jury. So we say that the Kelly case, decided in 241 U. S. 485, and quoted on p. 25 of petitioner's brief, not only does not sustain the petitioner, but leaves the matter to the law of the forum.

The other case cited by opposing counsel, to-wit: the case of Gulf &c. Ry. vs. Moser, 48 S. Ct. 49, 72 L. ed. 64, does not

sustain the contention of counsel, the court merely holding in that case, as appears from headnote number 1 of the decision as published in 72 L. ed. p. 64, as follows:

> "In awarding damages for death under the Federal Employer's Liability Act, the jury must determine the present value of the pecuniary loss calculated as bearing interest at the highest net rate that can be had on money safely invested."

So this decision seems to hold squarely that the jury must determine the present value. The judge below so charged the jury, and told the jury that it was a matter for them to decide as to what the earning power of money at this place and at this time and under all the conditions here present would be.

In the case of Chesapeake & Ohio R. R. Co. vs. DeAtley, reported in 241 U. S. p. 310, the court on page 317 said:

> "Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Minneapolis & St. L. R. Co. vs. Bombolis, No. 478, this day decided (241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595)."

The general rule only is that the court must instruct the jury as to what the words "present worth" or "present value" are, and this the judge in the case at bar did. He instructed the jury fully on page 162 that the present cash value of future benefits of which the beneficiaries were deprived was the proper measure of damages, and that the jury were authorized to make the calculations reducing these sums to their present value; that whatever the annual loss of these beneficiaries might be, throughout the expectancy of the decedent or throughout such part of his expectancy as the beneficiaries are found to have

received the benefits, the sum would be reduced to its present cash value on the rate of interest which the jury fixed under the instructions given. There is no complaint made as to the adequacy of these instructions.

We contend there is no rule in Georgia requiring either evidence as to the rate of interest or as to the method of reducing a sum to its present value. Moreover, we say no such question is made in the Record, and no such question was passed on by the Court of Appeals, as see its opinion pp. 164 through 168 of the Record. The only proposition which at all touches upon the subject in the decision of the Georgia Court of Appeals is headnote 10 of page 168, reading as follows, to-wit:

> "10. Where, in the trial of a case under the Federal employer's liability act, the court charged the jury, with reference to reducing to a present cash valuation a sum representing damages for loss of future benefits, that in making such reduction the jury should make an 'adequate allowance, according to the circumstances, for the earning power of money,' and that it should 'be reduced to its present cash value upon a rate of interest which you fix as reasonable, just, and right under all the circumstances,' the charge stated a correct rule of law; and in the absence of a special request for a more specific charge, a failure of the court to charge that the jury, in making such reduction, should take into consideration the earning power of money when invested with ordinary care, was not error."

The practice in Georgia is not to prove before the jury the mere methods of mathematical calculation in ordinary matters, but to leave the same to the jury. The Supreme Court of Georgia, in L. & N. R. R. vs. Trout, 141 Ga. p. 121, used the following language, through presiding Justice Evins, on p. 123:

> "2. Complaint is also made that the court omitted to give in charge to the jury the mathematical process of reducing a sum payable at a future time to its present worth.

> Jurors are selected from the enlightened and intelligent citizens of the community, and there is no presumption of their inability to solve a mathematical problem of this kind. If a party is distrustful of a jury's ability in this regard, a timely written request, accurately stating the rule, should be made."

Thus, we see that under our practice, if more detailed instructions are desired than were given by the judge on the method of reducing future sums payable in installments to their present cash value, then a request so to charge should have been given; but it will be seen that Judge Pomeroy went as fully into this matter as a judge need go, certainly under the Georgia practice.

There was no requested instruction to the effect that the allowable rate of interest must be proved and must appear from the evidence in the case.

In the case of Louisville &c. R. R. vs. Holloway, 246 U. S. p. 525, the court instructed the jury that the damages recoverable by a widow under the Federal Employer's Liability Act for the death of her husband were such as would fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received but for her husband's death (and this language was substantially given to the jury in the case at bar, as see the charge of the court on p. 160 of the Record).

In the Holloway case just quoted, it was held that the railroad was not denied the benefit of the rule that financial future benefits should be reduced to their present cash value by an instruction that the damages should fairly and reasonably compensate the widow for the loss of pecuniary benefits which she might reasonably have received but for the husband's death, and it was held that if any further instruction was desired than

that given, it should have been requested, and that a requested instruction which erroneously limited the jury to the legal rate of interest in making the discount was properly refused.

But, as hereinbefore stated, the question is not really involved as to whether proof should be made before a jury of the method by which sums may be reduced to their present cash value, or the rates of interest, for all this was fully done by the introduction of both the Carlisle Mortality Table and the Carlisle Annuity Table at two rates of interest, the annuity table with the two rates of interest having been introduced by the defendant.

Respectfully submitted,

REUBEN R. ARNOLD,

Attorney for Respondent in Certiorari.

SUPREME COURT OF THE UNITED STATES.

No. 234.—October Term, 1928.

The Western & Atlantic Railroad, Petitioner, *vs.* Mrs. Nora E. Hughes, Administratrix.	On Certiorari to the Court of Appeals of Georgia.

[February 18, 1929.]

Mr. Justice Brandeis delivered the opinion of the Court.

Ira L. Hughes, a travelling fireman, was killed on the Western & Atlantic Railroad while engaged in the performance of his duties. His widow as administratrix brought this action under the Federal Employers' Liability Act in a state court of Georgia. She recovered a verdict of $17,500, which was set aside as excessive by the presiding judge. At the second trial before another judge and jury a verdict was rendered for $10,000. A motion for a new trial was overruled. Judgment was entered on this verdict; and it was affirmed by the intermediate appellate court. The Supreme Court of the State refused a certiorari. This Court granted the writ. 278 U. S. —.

Hughes was killed while riding on a locomotive moving in interstate commerce. The plaintiff claimed that he was knocked from the running board and thrown against an upright on a bridge as the train entered it; that the accident resulted from an unusual rocking of the engine from side to side due to the defective condition of the track leading to the bridge; that the Railroad had been negligent in permitting the track to remain in bad condition; and that this negligence was the proximate cause of the injury. The Railroad claimed that the alleged cause of the accident was mere speculation. It denied that the track was in bad condition; denied that its condition had produced the alleged swaying of the locomotive; denied that it had been guilty of any negligence; insisted that the accident was the result of Hughes' gross negligence and his disobedience of the company's rules; claimed that

he had assumed the risk; and requested a directed verdict. The request was denied.

The Railroad asserts that the scintilla of evidence rule prevails in Georgia; and argues that the lower courts erred by applying the local rule in this case. It is true that submission to the jury of contested issues of fact is not required in the federal courts, if there is only a scintilla of evidence, *Baltimore & Ohio R. R. Co. Groeger*, 266 U. S. 521, 524; that it is the duty of the judge to direct the verdict, when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party, *Elliott* v. *Chicago, Milwaukee & St. Paul Ry.*, 150 U. S. 245; *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254; and that this federal rule must be applied by state courts in cases arising under the Federal Employers' Liability Act, *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U. S. 472, 474; *Gulf, Mobile & Northern R. R.* v. *Wells*, 275 U. S. 455, 457; *Toledo, St. Louis & Western R. R.* v. *Allen*, 276 U. S. 165, 168. We need not consider whether the rule prevailing in Georgia differs substantially from the federal rule.[1] For even under the federal rule it was proper to submit the case to the jury. The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. There was much conflict in the evidence. The first trial occupied five days. At the second trial thirty-three witnesses testified. Some of the testimony given by witnesses for the Railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict.

The Railroad contends also that there was error in assessing the damages. It argues that nominal damages only were recoverable since the plaintiff failed to introduce evidence either as to the proper method of computing the present value of the antici-

[1]Compare Georgia Code, §§ 5926, 6082, 6087, 6088; Central of Georgia Ry. *v.* Harden, 113 Ga. 453, 461; Southern Ry. Co. *v.* Myers, 108 Ga. 165; Skinner *v.* Braswell, 126 Ga. 761; Burroughs *v.* Reed, 150 Ga. 724, 726; Georgia Ry. & Electric Co. *v.* Harris, 1 Ga. App. 714, 716-717; Carter *v.* Central of Georgia Ry. Co., 3 Ga. App. 222; Smith *v.* Atlantic Coast Line R. R., 5 Ga. App. 219, 222; Neill *v.* Hill, 32 Ga. App. 381.

pated benefits or as to the rate of interest which should be applied in doing so. The evidence was ample. Among other things, there were mortality tables introduced by the plaintiff and annuity tables offered by the Railroad—tables in which values were computed at both the six per cent and the seven per cent rate. The Railroad argues also that the charge failed to make it clear to the jury that, in computing the damages recoverable for the operation of future benefits, adequate allowance must be made, according to circumstances, for the earning power of money; that the verdict should be for the present value of the anticipated benefits; and that the legal rate of interest is not necessarily the rate to be applied in making the computation. *Chesapeake & Ohio Ry.* v. *Kelly,* 241 U. S. 485, 491; *Gulf, Colorado & Santa Fe Ry.* v. *Moser,* 275 U. S. 133. There is no room for a contention that the charge failed to state correctly the applicable rule. If more detailed instruction was desired, it was incumbent upon the Railroad to make a request therefor. *Louisville & Nashville R. R.* v. *Holloway,* 246 U. S. 525. It did not do so.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.